119-566

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 307. 64

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN M. O'NEIL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED SEPTEMBER 28, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 307.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceeding as also in the rendition of the judgment of a plea which is in said circuit court before you, between John M. O'Neil, plaintiff, and the Chicago and Northwestern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Chicago and Northwestern Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 27th day of April, A. D. 1883.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUNZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed.

O. P. SHERAS, *Dist. Judge.*

[Endorsed:] Filed Apr. 27, 1883. A. J. Van Duzen, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John M. O'Neil:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the northern district of Iowa, eastern division, wherein The Chicago and Northwestern Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Dubuque, in said district, this 27th day of April, 1883.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

O. P. SHERAS,
Dist. Judge.

Filed April 30, 1883, together with copy of same, which copy was by me mailed to W. A. Foster, Davenport, Iowa, this day.

A. J. VAN DUZEE, *Clerk.*

Receipt acknowledged by W. A. Foster under date May 2, 1883.

A. J. VAN DUZEE, *Clerk.*

3 Dictated.

LAW OFFICE of W. A. FOSTER,
304 BRADY STREET,
DAVENPORT, IOWA, *May 2d*, 1883.

A. J. VanDuzee, Esq., clerk U. S. courts, Dubuque, Iowa.

DEAR SIR: Yours of yesterday, enclosing citation in O'Neil case *vs.* C. & N. W. Railway Company, received.

Very respectfully,

W. A. FOSTER,
DARROW.

4 Know all men by these presents that we, The Chicago and Northwestern Railway Company, a corporation duly organized and existing under and by virtue of the laws of the States of Illinois and Wisconsin, as principal, and John Weare, of Linn county, Iowa, as surety, are held and bound unto John M. O'Neill, of Clinton county, Iowa, in the sum of thirty thousand dollars, for the payment of — we bind ourselves, our executors and assigns, and our heirs and legal representatives upon the following conditions:

Whereas in a suit pending in the United States circuit court for the northern district of Iowa, eastern division, at the April term thereof, 1883, a verdict and judgment was rendered in favor of said John M. O'Neill and against the Chicago & Northwestern Railway Company in the sum of fifteen thousand dollars besides costs; and

Whereas the said railway company has sued out a writ of error to the Supreme Court of the United States from said verdict and judgment:

Now, if the said The Chicago & Northwestern Railway Company, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, and shall also pay the said verdict and judgment, and interests and costs of said writ, including just damages for delay, then this bond to be void; otherwise in full force and effect.

THE CHICAGO & NORTHWESTERN
RAILWAY COMPANY,
By ALBERT KEEP, *President.*

5 With the seal of the corporation attached.

[L. S.] JOHN WEARE, *Secret-y.*

Attest:

J. B. REDFIELD, *Ass't S'c'y.*

STATE OF IOWA, }
Linn Co., } ss:

I, John Weare, being first duly sworn, on oath, say that I am a freeholder and resident of Linn county, Iowa: that I have in my name and am the owner of real estate in the State of Iowa, wholly unencumbered, of the value of more than thirty thousand dollars, not exempt from execution, and that I am worth more than the sum of thirty thousand dollars over and above my just debts, and have real property, not exempt from execution, of the value of more than thirty thousand dollars over and beyond the payment of all my just debts.

JOHN WEARE.

Subscribed and sworn to before me and in my presence by John Weare this 23rd day of April, 1883.

Witness my hand and notarial seal hereto annexed the day & year last above written

[L. S.] J. C. LEONARD,
Notary Public in and for Linn Co., Iowa.

6 Endorsed as follows: John M. O'Neil *vs.* Chicago & Northwestern Railway Co. Bond. Approved & filed this 25 April, 1883. A. J. Van Duzee, clerk.

7 UNITED STATES OF AMERICA, }
Northern District of Iowa. } ss:

Pleas before the circuit court of the United States for the northern district of Iowa, eastern division, at a term begun and holden in the city of Dubuque, in said district, on the third Tuesday of April, A. D. 1883, before the Hon. Oliver P. Sheras, judge of the district court of the United States for [the] northern district of Iowa and associate justice of the circuit court.

JOHN M. O'NEILL }
vs. } No. 32. Law.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY. }

Be it remembered that heretofore, to wit, on the 19th day of April, 1881, a transcript of record was filed in the office of the clerk of the circuit court of the United States for the district of Iowa, northern division, in words and figures following, to wit:

8 *Petition. Filed March 5*, 1878.

In the Circuit Court, Clinton County, Iowa. April Term, 1878.

JOHN M. O'NEILL
vs.
THE CHICAGO AND NORTHWESTERN RAILROAD COMPANY.

The plaintiff complains of the defendant, The Chicago and Northwestern Railroad Company, a corporation organized and existing under the laws of the State of Illinois, and doing *in* business in the

State of Iowa, being engaged in operating a railroad in said last-named State, moving by steam power cars containing passengers and goods over the said railroads; that the plaintiff, on the 18th of October, 1877, in the city of Clinton, State of Iowa, was in the employment of defendant as a car repairer of defendant's said cars, and whilst at said date and in said city plaintiff was engaged in the performance of his duty repairing one of defendant's cars which was standing on one of defendant's side tracks, the plaintiff standing at a height of about nine feet from the ground on a ladder which was inclined against said car, the plaintiff was then and there,
9 through the carelessness, negligence, and default of said defendant and its servants thrown violently to the ground, breaking the right leg of plaintiff and inflicting upon him other great and permanent injuries, to the damage of plaintiff in the sum of fifteen thousand dollars.

The plaintiff therefore demands judgment against the said defendant for the sum of fifteen thousand dollars, with interest and costs.

W. A. FOSTER AND JOHN I. MULLANY,
Attorneys for Plaintiff.

10 *Original Notice.*

In the Circuit Court of the State of Iowa in and for Clinton County.

JOHN M. O'NEILL, Plaintiff,
vs.
THE CHICAGO AND NORTHWESTERN RAILROAD COMPANY, Defendant.

To said defendant:

You are hereby notified that there is now a petition of said plaintiff filed in the office of the clerk of the circuit court of the State of Iowa, in and for Clinton county, claiming of you the sum of $15,000.00, with interest thereon, as damages for injuries sustained by him while in your employment through your carelessness and negligence, and that unless you appear thereto and defend before noon of the second day of April term, A. D. 1878, of said court, which will commence on the first day of April, A. D. 1878, default will be entered against you and judgment rendered thereon.

W. A. FOSTER AND JOHN I. MULLANY,
Attorneys for Plaintiff.

11 *Return on Notice.*

STATE OF IOWA, }
Clinton County, } *ss:*

I, E. M. Purcell, sheriff of said county, hereby certify and return that I received the within original notice for service on the 5th day of March, 1878, and that on the 5th day of March, 1878, at the city of Clinton, in said county, I served the same personally on the Chicago and Northwestern Railroad Company, the defendant therein

named, by giving J. S. Oliver, agent of *of* said R. R. company, a copy of said notice, he waiving the reading of said notice.

Dated Clinton, March 5, 1878.

E. M. PURCELL,
Sheriff of said County.

Fees got. Paid by John J. Mullany. E. M. P., S.

12 *Petition for Transfer of Suit to Federal Court.*

In the Circuit Court of Clinton County, State of Iowa.

JOHN M. O'NEIL, Pl'ff,
against
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Def't.

To the honorable the circuit court of Clinton county, State of Iowa:

Your petitioner, The Chicago & Northwestern Railway Company, respectfully shows that it is defendant in the foregoing entitled suit, and that the same was commenced by plaintiff on or about the 5th day of March, 1878, in said court; that your petitioner was at and before the time said suit was commenced, and at all times since has been and still is, a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said State, with its principal place of business therein, and that your petitioner has never been organized under the laws of Iowa, and is not now and never was a citizen of the State of Iowa; that plaintiff was at and before the time this suit was commenced, and at all times since has been and still is, a citizen of the State of Iowa and a resident thereof.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your
13 petitioner and the said plaintiff; that said action was brought by the plaintiff to recover damages for personal injuries alleged to have been received by him on account of the negligence of this petitioner in the sum of $15,000, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in the circuit court of the State of Iowa for said county of Clinton, and that your petitioner desires to remove the same into the circuit court of the United States for the district of Iowa, northern division, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision 3, and the subsequent amendments thereto.

Your petitioner further says that it has filed the affidavit required by the statute in such cases made and offers herewith its bond, executed by John Weare, of Lynn county, Iowa, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that the said bond may be accepted

as good and sufficient according to the said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for said district of Iowa, northern division,
pursuant to the aforesaid act of Congress in such case made
14 and provided and subsequent amendments thereto, and that
no further proceedings may be had therein in this court; and your petitioner will ever pray.

N. M. HUBBARD,
Attorney for Petitioner.

15 *Affidavit. Filed November* 17, 1880.

STATE OF ILLINOIS, }
County of Cook, } ss:

In the Circuit Court of Clinton County, State of Iowa.

JOHN M. O'NEILL, Pl'ff,
ag't
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Def't.

I, Albert Keep, being duly sworn, do say that I am & have been for the past seven years president of the Chicago & Northwestern Railway Company, a corporation duly organized and existing for more than seven years last past under and by virtue of the laws of the State of Illinois, and a citizen of said State; that said corporation is not and never has been organized under the laws of the State of Iowa, and is [not] and never has been a citizen of Iowa; that I have reason to believe and do believe that from prejudice and local influence the said defendant, The Chicago & Northwestern Railway Company, mentioned in the foregoing entitled suit, will not be able to obtain justice in said State courts.

ALBERT KEEP.

Subscribed by the said Albert Keep in my presence and by him sworn to before me at Chicago, Cook county, Illinois, this 12th
16 day of November, A. D. 1880.

[L. S.] JOSEPH B. REDFIELD,
Notary Public in and for Cook County, Illinois.

STATE OF ILLINOS, }
Cook County. } ss:

I, E. F. C. Klakke, clerk of the county court of Cook county, the same being a court of record, do hereby certify that Joseph B. Redfield, Esq., whose name is subscribed to the annexed jurat, was at the time of signing the same a notary public for Cook county, duly commissioned, sworn, and acting as such, and authorized to administer oaths; that I am well acquainted with his handwriting, and I verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of Chicago, in said county, this 12th day of November, 1880.

[L. S.] E. F. C. KLAKKE, *Clerk.*

17 *Bond. Filed and Approved November* 17, 1880.

Know all men by these presents that the Chicago & Northwestern Railway Company, as principal, and John Weare, of Cedar Rapids, Iowa, as sure*ties*, are held and firmly bound unto John M. O'Neill in the penal sum of two hundred and fifty dollars; for the payment whereof, well and truly to be made unto the said John M. O'Neill, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said Chicago & Northwestern Railway Company having petitioned the circuit court of Clinton county, State of Iowa, for removal of a certain cause therein pending, wherein said John M. O'Neil is plaintiff, and said Chicago & Northwestern Railway Co. is defendant, to the circuit court of the United States in and for the district of Iowa, northern division:

Now, if the said Chicago & Northwestern Railway Co., your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void;

18 otherwise, in full force and virtue.

Witness our hands and seals this 16th day of November, A. D. 1880.

JOHN WEARE. [L. S.]
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, [L. S.]
By N. M. HUBBARD, *its Att'y.*

STATE OF IOWA, } ss:
Linn County, }

I, John Weare, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Iowa; that I am worth the sum of five hundred dollars beyond the amount of my debts; that I have property in the State of Iowa liable to execution equal to the sum of two hundred & fifty dollars.

JOHN WEARE.

Subscribed and sworn to before me this 16th day of November, A. D. 1880.

[L. S.] F. F. DAWLEY,
Notary Public, Linn Co., Iowa.

19 THE STATE OF IOWA, } ss:
Clinton County. }

Be it remembered that heretofore, to wit, at a term of the circuit court of the State of Iowa begun and held at Clinton in and for said county on the first Monday in January, A. D. 1881—present, the Hon. Chas. W. Chase, judge of the 1st circuit of the Seventh Judi-

cial district of the State of Iowa, E. M. Purcell, sheriff of said county, and A. H. Paddock, clerk of said court—the following entitled cause coming on to be heard on the 3rd day of January, A. D. 1881, and still during said term of said court the following among other proceedings were had thereon, to wit:

JOHN M. O'NEIL
vs.
THE CHICAGO AND NORTHWESTERN RAILROAD CO. } 3276. At Law.

On this 3rd day of January, A. D. 1881, this cause came on to be heard upon the application of the defendant to remove this case to the United States circuit court.

The plaintiff appearing by W. A. Foster and Jno. T. Mullany, his attorneys, and the defendant by N. M. Hubbard, its attorney, and the cou-t having heard said application and being fully advised in the premises grants the same.

It is therefore ordered by the court that this case be re-
20 moved to the United States circuit court for the district of Iowa for trial.

THE STATE OF IOWA, } ss:
Clinton County.

I, A. H. Paddock, clerk of the circuit court of the State of Iowa in and for said county, do hereby certify that the above and foregoing is a true and perfect transcript of all the papers and of the record entry of change of place of trial in the above-entitled cause as fully as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the court-house in the city of Clinton, in said county, this 24th day of February, A. D. 1881.

[L. S.] A. H. PADDOCK,
Clerk of said Court.

21 In the United States Circuit Court, District of Iowa, Northern Division.

JOHN M. O'NEIL
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY. } No. 32. Law.

The defendant moves the court to require the plaintiff to make the petition more specific, in this, to require the plaintiff to set out specifically the negligence by which he claims that he received his injury, and for cause of this motion defendant says that it is not able to prepare itself for trial intelligently without knowing what acts of commission or omission plaintiff complains of on the part of the defendants.

Wherefore defendant prays judgment.

N. M. HUBBARD,
Att'y for Def't.

Endorsed as follows: John M. O'Neill *vs.* The Chicago & N. W. R'y Co. Motion for more specific statement. Filed 19 April, 1881. H. K. Love, clerk U. S. c't court, Nn. district of Iowa.

22 *Amendment to Petition.*

In the United States Circuit Court, District of Iowa, Northern Division. April Term, 1881.

JOHN M. O'NEILL

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

The plaintiff, John M. O'Neill, hereby amends his petition herein filed, and states that the said defendants and its agents, seeing and knowing that plaintiff was on said ladder, as stated in said petition, carelessly and negligently, and without any notice to plaintiff, violently run an engine and way-car against the line of cars on which plaintiff was at work, the concussion following throwing plaintiff to the ground, as stated in said petition.

W. A. FOSTER AND JOHN MULLANY,
Att'ys for Plaintiff.

Endorsed as follows, to wit: No. —, U. S. circuit court. John M. O'Neill *vs.* Chicago & Northwestern Railway Co. Amendment to petition. Filed this 20th day of April, 1881. H. K. Love, clerk, U. S. c't c't.

23 *Amendment to Petition.*

In U. S. Circuit Court, Dist. of Iowa, Northern Division.

JOHN M. O'NEILL

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY CO.

Now comes pl'ff and, by leave of court first had, amends his original petition and amendment thereto, heretofore filed herein as follows, viz:

1. He states that while properly and not negligently performing the service stated in said original petition, his position became suddenly dangerous by reason of the shifting of certain switches and running an engine and car upon the track where he was working.

That the switchman performing said service of shifting said switches saw plaintiff in his position, which became dangerous by said acts, and although plaintiff was thereby placed in imminent peril thereby, and said switchman could easily have prevented a collision and injury to plaintiff by the exercise of ordinary care and caution, in either apprising pl'ff of the sudden approach of said engine or by turning the brake upon said car, or causing the engineer in charge of said engine to stop the same, he failed so

24 to do but carelessly, negligently, and heedlessly allowed said collision and injury to take place to pl'ff's great injury.

2. That the fireman upon said engine saw pl'ff in said exposed position, and, after the danger and peril of pl'ff's life and limbs were well known to him, he allowed said collision to take place, although he could, by the exercise of ordinary care, have prevented it by notifying the engineer that pl'ff was in danger, but that he carelessly, negligently, and with a total disregard for pl'ff's safety, neglected and failed to impart said notice, and pl'ff was injured thereby.

3. That the engineer in charge of said engine thrown in and upon said track as aforesaid, by reason of pl'ff's perilous position, was ordered to stop his said engine, and that he could easily have obeyed said instruction, but disregarding said order to stop and carelessly and heedlessly refusing to inquire into the cause of such order, but with a negligent and total disregard of consequences, hurried said engine on to a collision, as stated in plaintiff's original petition.

4. That the facts rendering pl'ff's position perilous by reason of the movements of said switches and car and engine were to pl'ff entirely unknown, although due care and caution was exercised by him.

Wherefore pl'ff prays judgment as heretofore.

JOHN T. MULLANY AND W. A. FOSTER,
Atty's for Pl'ff.

25 Endorsed as follows: John M. O'Neill *vs.* The Chicago & Northwestern Railway Company. Amendment to petition. Filed 21 April, 1882. Alfred Hobbs, deputy clerk, U. S. c't c't.

26 *Answer.*

In the Circuit Court of the United States *United States*, Dist. of Iowa, Northern Division.

JOHN M. O'NEIL
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

For answer to plaintiff's petition herein as amended defendant states—

I.

It denies each and every allegation in said petition and amendment contained.

II.

The plaintiff was guilty of negligence, which contributed to the injury complained of, in this: He failed to notice or listen for the approach of engines or other cars, and failed to get down from the ladder whereon he stood when the engine and car which caused the injury approached the line of cars whereon plaintiff was at work in plain sight of *plaintiff*, with the bell ringing to warn all persons of their coming.

Wherefore defendant prays judgment.

N. M. HUBBARD,
Att'y for Def't.

Filed April 20, 1881.

H. K. LOVE, *Clerk.*

27 United States Circuit Court, Northern District of Iowa, Eastern Division. April Term, 1883.

WEDNESDAY, 18TH DAY OF APRIL, A. D. 1883.

Second day.

Hon. Oliver P. Shiras presiding.

JOHN M. O'NEIL
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 32. At Law.

This cause coming on to be heard, the pl'ff, appearing by W. A. Foster, Esq., and John J. Mullany, Esq., his attorneys, and the said defendant by N. M. Hubbard, Esq., and Chas. A. Clark, Esq., its attorneys, thereupon cam- a jury of twelve good and lawful men, citizens of the district, who were duly empanneled, tried, and sworn well and truly to try the issue joined, and a true verdict to give according to the law and the evidence.

The hearing of the evidence not concluded at the hour of adjournment.

28 THURSDAY, 19th day of April, A. D. 1883.

Third Day.

Hon. Oliver P. Shiras presiding.

JOHN M. O'NEILL
vs.
THE CHICAGO & NORTHWESTERN R. R. CO. } No. 32. Law.

This cause again coming on to be heard, the jury being all present, and the evidence and the arguments of counsel having been heard, the cause was submitted to the jury by the court, and the jury thereupon retired in charge of an officer of this court to consider their verdict.

By consent of counsel, the hour of adjournment having arrived—

It is ordered by the court that should the jury agree upon their verdict during the adjournment of the court, *that* they be permitted to seal up the same and deliver it to the court at the assembling of court to-morrow morning.

29 FRIDAY, 20th day of April, A. D. 1883.

Fourth Day.

Hon. Oliver P. Shiras presiding.

JOHN M. O'NEILL
vs.
THE CHICAGO & NORTHWESTERN R. R. Co. } No. 32. Law.

This cause again being called, the jury came into court, and being all present, delivered the following verdict, viz:

"We, the jury, find for the plaintiff, and assess his damages at fifteen thousand dollars.

"H. B. WELCH, *Foreman.*"

It is therefore ordered and considered by the court that the said plaintiff have and recover of and from the said The Chicago & Northwestern Railroad Company the sum of fifteen thousand dollars ($15,000.00), together with his costs in this behalf and the costs of suit, taxed at $——.

The plaintiff thereupon gave notice of appeal to the Supreme Court of the United States, — presented his bill of exceptions, which was signed by the court.

30 *Bill of Exceptions.*

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division. April Term, 1883. Dubuque.

JOHN M. O'NEIL, Def't in Error,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Pl'ff in Error.

Be it remembered that now, to wit, on this April 18, 1883, it still being the April term of said court, the above-entitled cause came on for trial before the Honorable O. P. Shiras, judge, and a jury, W. A. Foster and J. T. Mullany appearing for the plaintiff, and Charles A. Clark and N. M. Hubbard appearing for the defendant, and thereupon the plaintiff, to sustain the issues on his part, offered and introduced the following testimony, to wit:

31 *Transcript of Testimony.*

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

JOHN M. O'NEIL
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

APRIL 18, 1883.

JOHN M O'NEIL, being duly sworn, testified as follows:

Questioned by Mr. FOSTER.

Direct examination:

Q. You may state your name to the jury.

A. John M. O'Neil.
Q. Where do you live?
A. Clinton City, Clinton county, Iowa.
Q. How long have you lived there?
A. Since November, 1865.
Q. What has been your business or what was your business up to October, 1877?
A. A carpenter and car builder.
Q. In whose employ were you?
A. The Chicago & Northwestern railroad.
Q. When did you enter the employment of the Chicago and Northwestern Railway Co.?
A. The 17th of November, 1865.
Q. Now, will you state to the jury what your business was as a car finisher?
A. My business; what I was hired for was a coach builder.
32 Q. Did the Northwestern railway build their own coaches?
A. They did at that time, and up to 1872, I believe; that is the Iowa division coaches, and director's coach, I believe one.
Q. Did they have a shop for the manufacture of this class of work that you speak of in Clinton?
A. Yes, sir.
Q. Who were you working under?
A. Working under, in the first place, William Campbell, and in the next place Richard Wharton, and then under Mr. Preston at the time of the injury.
Q. At the time you received some injuries in the month of October, '877?
A. Yes, sir.
Q. Who was your immediate foreman?
A. Master Car-Builder H. L. Preston.
Q. What was your position in the shop with reference to having charge of any of the employes in the absence of Mr. Preston?
A. I had charge of the building of way-cars in the shop.
Q. I will ask you whether your employment required you to do any labor outside the shops of the company?
A. Not except by orders of Mr. Preston.
Q. Well, when you were so ordered, what work did you have to do outside of the shops, if any?
A. Put on locks, put in windows, put on lamp brackets, flag holders, and the like.
Q. Where was this work done?
A. Sometimes done in the yard by the shop, sometimes
33 between the shop and the upper yard, and sometimes in the upper yard, and sometimes over by the depot, and sometimes by the bridge, a mile over there.
Q. When you received instructions to do work from Mr. Preston were you instructed also where to do that work?
A. Yes, sir.
Q. You may state whether there was any particular track, or part of a track, set apart and known as the way-car track?

29 FRIDAY, 20th day of April, A. D. 1883.

Fourth Day.

Hon. Oliver P. Shiras presiding.

JOHN M. O'NEILL
vs.
THE CHICAGO & NORTHWESTERN R. R. Co. } No. 32. Law.

This cause again being called, the jury came into court, and being all present, delivered the following verdict, viz:

"We, the jury, find for the plaintiff, and assess his damages at fifteen thousand dollars.

"H. B. WELCH, *Foreman.*"

It is therefore ordered and considered by the court that the said plaintiff have and recover of and from the said The Chicago & Northwestern Railroad Company the sum of fifteen thousand dollars ($15,000.00), together with his costs in this behalf and the costs of suit, taxed at $——.

The plaintiff thereupon gave notice of appeal to the Supreme Court of the United States, — presented his bill of exceptions, which was signed by the court.

30 *Bill of Exceptions.*

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division. April Term, 1883. Dubuque.

JOHN M. O'NEIL, Def't in Error,
vs.
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Be it remembered that now, to wit, on this April 18, 1883, it still being the April term of said court, the above-entitled cause came on for trial before the Honorable O. P. Shiras, judge, and a jury, W. A. Foster and J. T. Mullany appearing for the plaintiff, and Charles A. Clark and N. M. Hubbard appearing for the defendant, and thereupon the plaintiff, to sustain the issues on his part, offered and introduced the following testimony, to wit:

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vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

APRIL 18, 1883.

JOHN M O'NEIL, being duly sworn, testified as follows:

Questioned by Mr. FOSTER.

Direct examination:

Q. You may state your name to the jury.

A. John M. O'Neil.
Q. Where do you live?
A. Clinton City, Clinton county, Iowa.
Q. How long have you lived there?
A. Since November, 1865.
Q. What has been your business or what was your business up to October, 1877?
A. A carpenter and car builder.
Q. In whose employ were you?
A. The Chicago & Northwestern railroad.
Q. When did you enter the employment of the Chicago and Northwestern Railway Co.?
A. The 17th of November, 1865.
Q. Now, will you state to the jury what your business was as a car finisher?
A. My business; what I was hired for was a coach builder.
32 Q. Did the Northwestern railway build their own coaches?
A. They did at that time, and up to 1872, I believe; that is the Iowa division coaches, and director's coach, I believe one.
Q. Did they have a shop for the manufacture of this class of work that you speak of in Clinton?
A. Yes, sir.
Q. Who were you working under?
A. Working under, in the first place, William Campbell, and in the next place Richard Wharton, and then under Mr. Preston at the time of the injury.
Q. At the time you received some injuries in the month of October, 1877?
A. Yes, sir.
Q. Who was your immediate foreman?
A. Master Car-Builder H. L. Preston.
Q. What was your position in the shop with reference to having charge of any of the employes in the absence of Mr. Preston?
A. I had charge of the building of way-cars in the shop.
Q. I will ask you whether your employment required you to do any labor outside the shops of the company?
A. Not except by orders of Mr. Preston.
Q. Well, when you were so ordered, what work did you have to do outside of the shops, if any?
A. Put on locks, put in windows, put on lamp brackets, flag holders, and the like.
Q. Where was this work done?
A. Sometimes done in the yard by the shop, sometimes
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Q. When you received instructions to do work from Mr. Preston were you instructed also where to do that work?
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Q. When you received instructions to do work from Mr. Preston were you instructed also where to do that work?

A. Yes, sir.

Q. You may state whether there was any particular track, or part of a track, set apart and known as the way-car track?

A. Yes, sir; there was.

Q. Where was that?

A. That was in the upper yard, between the cut-offs.

Q. What was the number of the track?

A. The number 2 track.

Q. Between the cut-offs on number 2 track in the upper yard was the way-car track?

A. Way-car track; yes, sir.

Q. You may state for how long a time you had been required to go upon the way-car track to make repairs.

A. For about a year occasionally.

Q. How frequently? How often each day, or each week, did you go?

A. Once a week, perhaps sometimes twice a week, and then again not —; the last time I was up I had not been up for three months or thereabouts.

Q. Do you remember the day on which you received your injury?

A. Yes, sir.

34 Q. When was it?

A. The 18th of October, 1877.

Q. Now you may state what, if any, instructions you received, and from whom, to make repairs on that occasion.

A. Mr. Preston ordered me to make three lamp-brackets and put them on car 31; that I would find it in the upper yard, on the way-car track.

Q. Three lamp-brackets?

A. Yes, sir.

Q. What time in the day did you receive this order?

A. About somewhere in the neighborhood of 8 o'clock or half-past eight, thereabouts.

Q. In pursuance of this order what did you do?

A. I went and made the lamp-brackets; also had an order to put on a side handle on another way-car; I made the lamp-brackets and went to the upper yard to put them on.

Q. Can you show to the jury how these lamp-brackets are made? Just explain to the jury what kind of lamp-brackets you made.

A. When I received the order from Mr. Preston I asked him if it was an iron-roofed car and he said it was, so I made the brackets accordingly for an iron-roofed car.

Q. What kind did you make?

(Witness here shows wooden bracket such as he used, and explains its construction.)

A. He said it was not an iron-roofed car. When I got up there I used this block (indicating) for Iowa division lamp-bracket.

35 When I got up there I found it was an iron-roofed car and would need a block like this (indicating), a thicker block, so the lamp-bracket would hang plumb. So, without going back to the shop, I took this and took that much off.

(Witness here takes a block and indicates that he cut a piece off the side to make it thinner, to make a bracket such as was used on a Chicago division car.)

Q. Show how the lamp-bracket goes on the side of the car, using the wall as the car, as near as you can.

(Witness here indicates that a long strip is screwed to the block and the block screwed on to the car with two large heavy screws at the bottom and two at the top.)

Q. If I understand you, Mr. O'Neil, these are just used for hanging a lantern-handle right on?

A. Yes, sir; these bull's eyes. This is screwed on to the car with two screws, and two more up there.

Q. How much work did you do before you go on to the car?

A. I put one on the southeast corner of the car, and then there would be a bracket on each end of that side. I went on the other side; I had orders to put three on. I went to the other side and put one on the northwest corner; then there was three on the north side; then I came over and put a bracket on the middle of
36 the car on the south side, but I found the bracket that was on an old one broken off in this direction; so I had to draw out these screws in the old bracket.

Q. What size screws?

A. No. 18 screws, 2 & ½, No. 18 or thereabouts, and they were full of paint in the slot.

Q. I don't remember about the size, Mr. O'Neil; can you tell which is the No. 18 here (holding up several screws)?

A. The largest size you have got there.

Q. That was the size screws you had to take out?

A. Yes, sir. In that class of cars the screws goes through the bracket and through the pine, and it has got to take hold in the hard wood brace, and there is a space between the pine and the hard wood, so the screw has got to be long enough to go through the space and into the brace.

Q. How was it necessary for you to stand; what appliance was it necessary for you to have with you when you were doing this work?

A. Using a brace with screw-driver.

Q. I have reference to what you had to stand on?

A. A ladder.

Q. Was that the proper way to do?

A. Yes, sir; think that is the only way we knew how to do it; always did.

Q. Will you explain to the jury, using this as an illustration (handing witness model car).

A. When I put this bracket on the southeast corner, after altering the bracket by this step, I put on this one; then I sawed this
37 one here all ready; we do not usually put on middle brackets unless it is ordered; then I went to the other side and put on this one; then I found this one was already on the north side of the middle; I frequently had to make this one right by the slid-

ing window; this window slides; that is where the conductor puts his hand out and hangs his lantern on the bracket; some of the men are not tall enough to reach that on the end, and they do not use them; they use these.

Q. Are those lamp-brackets the place where the bull's eyes hang at the end to show the engineer the end of his train?

A. Yes sir.

Q. Explain to the jury how you had to put your ladder.

A. I put the ladder against the side of the track; the distance between the tracks is, I believe, seven feet; ten between the rails; this car is 9 feet 4 wide, and the rails are pretty near 4 feet 8 & ½, and consequently there is about 2 feet 4 inches of the car projecting over the rail; then my ladder would bring my feet against the rung, another 18 inches from the side of the car; consequently they throwed me down on the ends of the ties on the main line track; when they struck the car the ladder went that way and acted as a fulcrum to throw me.

Q. Just show where that bracket was to go on.

A. There between those two windows.

Q. Now, then, where did you set the ladder?

A. Where the screw is set.

38 Q. The bracket was between the ladder and the window?

A. I could not put it on by putting the ladder this side of the window; it would be too far away; the window is two feet wide; consequently I could not reach to the east side of the window?

Q. I understand you to say if you put your ladder to the left of it it would go into the window.

A. Yes, sir.

Q. How would it throw your back?

A. Throw me in about the position I am in now. (Turning his back on one side of chair.)

Q. As that is represented, from which direction did the engine finally come?

A. From this end; this was the third car; there was two east of me again.

Q. I will ask you to state to the jury what precautions or examination you made before going up on the car, to ascertain whether you were liable to an injury from an approaching car or engine?

A. It has been the custom always, in my observation, to notice the switches, and if the switches are turned off the track you are ordered to work on, you can rely on it; and those were turned off from number 2, the way-car track.

Q. How many switches was necessary from the east to be turned on before you could be injured from the east?

39 A. I knew they could not come up number 2; there was a train on number 2 without any engine on. They must, to come up from the south, move two switches on the main line track, and one switch onto number 2 track, and then another switch to let them on the way-car track.

Q. Then, as I understand you, it would necessitate the turning of

four switches that were turned off from this track that you were on?

A. Yes, sir.

Q. How were you protected from the other way?

A. There was odd cars along the way-car track, about 7 or 8 hun- feet of track between the cut-offs, and there was there was four or five cars in the bunch I was working on, and then there was one three or four rods further west, and then there was 3 or 4 or 6 along that way for a considerable distance. There was considerable distance between the nearest one west of mé and me.

Q. I will ask you whether in your opinion these cars could have been caught up and run down to where you were without your seeing them?

A. No, sir.

Q. What was the condition of the track east of you, looking east from where you were working, as to its being level?

A. It was a level track.

Q. How is it with the country round there, the yard?

A. All level.

Q. You may state to the jury whether or not there was anything to prevent switchmen and engineers and firemen coming in
40 and crossing over these switches bearing to the northward; anything to prevent their seeing you, as you were standing upon the ladder?

A. No, sir; there was nothing to prevent them.

Q. Are the tracks straight at that place?

A. They are straight at that place.

Q. I mean the main tracks?

A. Yes, sir.

Q. And the cut-offs are diagonally across?

A. Yes, sir.

Q. How long had you been upon the ladder, Mr. O'Neill, before you felt the cars strike?

A. Well, I did not time it, but I should judge between two & three minutes—probably two minutes.

Q. What had you done up to that time?

A. When I came around from the west end I looked down the track and saw Hennesy and Whittey go down. They were working on the car next east of me. I put my brace on my arm, put the bracket in my hand, and went up and put them on top the car, and then went down & took the screws out; when I got them out I stepped up again to get the bracket, and then they struck.

Q. How many screws did you get out?

A. I took out the two lower ones and broke the upper ones.

Q. Then you were up on the ladder just long enough to take out two screws and break two off?

A. Yes, sir.

Q. How did you break them off?

41 A. With the hammer. Those in hard wood I could break off, but those in the pine I did not dare to break off.

Q. Did it make some noise in breaking these off?

A. Yes, some; not a great deal, though.

Q. I will ask you while you were doing this work how near your face was to the edge of the car?

A. Within 4 or 5 inches of the car.

Q. You were standing upon the ladder how far from the ground?

A. In the neighborhood of 7 to 8 feet—along there.

Q. That is your feet were 7 or 8 feet, do you mean?

A. No; at the latter time when I was up getting the bracket they were up 7 or 8 feet. When I was taking out the screws I would be 16 inches lower.

Q. As I understand you, you mean the jury to understand that you first laid your tools on the top of the car, stepped down one step and unscrewed two screws, and broke two off with the hammer, and then stepped up, and then they struck?

A. Yes, sir.

Q. What were your oppotunities, Mr. O'Neil, for looking up and down the track when you were in this position upon the ladder?

A. Not without turning round. I could look up the track west partly, but would have to lean out some to get a fair view.

Q. That is towards where these odd cars were standing along?

A. Yes, sir.

42 Q. How was it eastward, the direction the engine came from?

A. Would have to step down or lean back some ways; my line of vision would be obstructed by the cars—the line behind the cars—while I was up close to them, while I was at work.

Q. I will ask you, as a matter of fact, if you heard any ringing of bells, or if you received any warning?

A. I received no warning.

Q. I will ask you if you slipped or fell any time while you were on the ladder on your own motion?

A. No, sir.

Q. Or made any misstep?

A. No, sir.

Q. You may explain to the jury just what you discovered at the time the cars struck.

Noon adjournment.

Q. You stated before dinner, Mr. O'Neill, I believe, that in coming in from the south side, in the manner you were informed the engine came in, that you, on the ladder, would be in plain sight of the persons operating the train, or, at least, the one on the side next to you?

A. Yes, sir.

Q. I will ask you, Mr. O'Neill, from where you stood, supposing the engine was going to come across onto track No. 3, near where you were working, if you could have discovered the turning of the switch throwing the cars onto track No. 2, where you were working?

A. Not the last switch turning onto the way car track. I could not see.

43 Q. Suppose that this engine and car, instead of coming in on track No. 2, had intended to pass north of you onto

track No. 3, could you have discovered a change of that switch which would allow them to pass on No. 2, instead of allowing them to pass by?

A. No, sir.

Q. I will ask you, Mr. O'Neil, whether if you had seen that engine coming down to within the *the* last switch that was turned, from the way in which the switches were opened when you went to work, where that engine would have gone?

A. The engine could not have got off the main line.

Q. But if the other switches had been turned—all but the last switch—where would the engine have gone?

A. Gone onto the track north of track No. 1.

Q. Would it have gone onto the track on which you were wa-king?

A. No, sir.

Q. How were these switches operated?

A. By hand.

Q. What appliances or machinery are used?

A. Some of them have gearing; the two on the main line had gearing wheels, and the other two are common switches turned with a handle.

Q. These end switches, are they upright rods?

A. No, I don't think either of those are.

Q. What are they?

A. They are turned on a quarter circle—half circle, I think they are.

Q. How far are these circles from the rail of the track?

41 A. About the height of this cane—2 feet 8.

Q. How far from the side?

A. Right in the center, between the two tracks; about 3 feet and a half from the track.

Q. That is, the machinery to turn the switches was half-way between number 2 and number 3.

A. Yes, sir.

Q. Now, taking the last switch that must have been turned to allow this engine to pass in on track No. 2, was that machinery on the same side you were on or on the opposite side?

A. That was on the north side, the opposite side.

Q. What side was you on?

A. I was on the south side of track.

Q. So then I understand you to state from where you were you could not see that last switch operated at all, even if you had been looking?

A. No, sir.

Q. And it was on the opposite side of the track from you?

A. Yes, sir.

Q. Have you seen this caboose car or way car No. 31 since that time, or did you see it afterwards?

A. Yes, sir; I saw it afterwards.

Q. How long?

A. The next spring after; in March, I think.

Q. Are you a draftsman as well as a carpenter?

A. Yes, sir.

Q. Did you make any draft showing the manner in which this car had been struck while your ladder was upon it?

45 A. I did, sir.

Q. Now, will you take that, Mr. O'Neill, and show to the jury what it represents (handing witness sketch).

A. This represents the side of the car, just a portion of it between the windows; that is one window, and this is the eave of the car; this is the cornice there, and these are the marks that the ladder made; and these are the marks made after the car was struck.

Q. That is, this mark was where the ladder was against the car when it was struck?

A. Yes, sir; the two legs of the ladder. That is one showing the fall of the ladder.

Q. In order that the reporter may get it down, the lower dots represent scratches where the ladder rested against the car at the time it was struck?

A. Yes, sir.

Q. And the upper dot and the scratch represent the east leg of the ladder after it was struck. From the character of the scratch, I will ask you, in your judgment, how far the car moved after it struck?

A. The car was moving faster than I was falling.

Q. Was the car painted?

A. Yes, sir; that color is easily marred.

Q. Was that drawn to a scale?

A. That is a fac simile from the car, full size.

46 Q. The distance between these two lower marks would be the width of the top of the ladder?

A. Yes, sir.

Q. How were you thrown, Mr. O'Neil, after the striking of that car?

A. When the car struck it struck with a double concussion, and wheeled me around partly, and threw me off about 16 or 18 feet, but not far out, right on the ends of the ties of the main line track, where they struck above ground the full thickness of the ties. When I came to the upper part of the ladder was 10 feet east of where I lay.

Q. About what was the slant of that ladder, Mr. O'Neil?

A. The slant of that ladder would be rested nearly against the bottom of the main line track ties.

Q. How many feet of slant?

A. The ladder was about 12 feet long. The ladder stood about five feet at the bottom from the car.

Q. I will ask you if you could have fallen from that ladder in such a way as to have gone the direction you did and the distance?

A. No, sir.

Q. What was the result of this fall?

A. Broke my right limb in two places above the knee, and then

broke the frame bone of my hip, knocked the hip in so it was deformed and weak, hurt my back, head, and arms.

Q. What has been your principal ailment since that time?

A. My hip, back, and head.

47 Q. Have you been able to stoop and lift a weight since that time?

A. No, sir.

Q. Have you been able to apply yourself to any mental work since that time?

A. I did, but cannot now. I have not been able to do it some two years nearly.

Q. State whether or not you are growing better or worse.

A. I think my limb is getting stronger, but my hip does not get stronger or the back. I cannot go up an incline plane except sideways. On the floor I can throw my leg along better than I used to.

Q. How long *have* were you confined to your bed by reason of this injury?

A. All winter most; but I was laid right down to bed for about 8 weeks. The remainder of the time until the next following June I was in bed most of the time.

Q. How long was it before you were able to get out of the house?

A. Some time in June, I think, sir.

Q. How did you walk then?

A. With crutches.

Q. You now walk with one cane, do you?

A. Yes, sir.

Q. Can you walk without the assistance of a cane?

A. I can, but not well; my hip goes right in. I cannot walk any distance. I can get around the room, but to walk I cannot without the assistance of a cane.

48 Q. State whether, since that time, you have been able to pursue any ordinary manual labor?

A. No, sir.

Q. Have you employed physicians?

A. Yes, sir.

Q. Have you purchased medicines?

A. Yes, sir.

Q. Been nursed?

A. Yes, sir.

Q. On account of this injury?

A. Yes, sir.

Q. You may state according to the best of your judgment or the information or knowledge upon that question as to what expense you have been to up to the present time on account of that injury.

A. About $2,500; doctors, nurse, and medicines, and other things pertaining to it.

Q. Have you been able to dress yourself at any time since then?

A. No, sir; I can pull on my pants by taking tongs I have made for the purpose.

Q. Can you put on a shirt?

A. No; I cannot reach my arms above my head to get the shirt on; cannot spread them out.

Q. Who has been with you and cared for you most of the time?

A. My wife.

Q. Are you still under the care of the physician?

A. Yes, sir.

Q. Who?

A. Dr. Farnsworth, of Clinton, Iowa.

Q. How old were you at the time of this accident, Mr. O'Neil?

A. About 43 years, not quite 43.

Q. And during your service for the company, and particularly the latter portion of it, what pay were you receiving?

A. Pay had been cut from $3.00 to $2.20. I was receiving
49 $2.20 at that time a day. It had been $3.00 a day, then cut to $2.90, $2.70, $2.60, $2.40, $2.20; kept cutting it down right along.

Q. Was your employment stated and constant?

A. Yes, sir.

Q. What was your condition of health, and what had been your condition of strength prior to this injury?

A. My strength and health were exceedingly good previous to the injury.

Q. Had you ever sustained any serious accident before?

A. Never.

Q. Had any serious illness?

A. No, sir.

Q. How did your wages compare with others similarly employed?

A. I was getting 20 cents a day more than the other employed the same.

Q. 20 cents a day more?

A. Yes, sir.

Q. Do you know how the wages paid then compare with the wages now?

A. I think the wages then were lower than they are now for the same class of skill.

Q. Well, the class of skill that was exercised by you; what are such services reasonably worth at the present time?

A. I think they are worth $2.40 to $2.50; in the neighborhood of those rates. Near Chicago I understand they are $2.50.

Q. You mean two dollars and a half a day?

A. Yes, sir.

Q. I understand you to say that at the time of this accident
50 you knew nothing of the approach of any engine or anything of that kind?

A. No, sir.

Q. Mr. O'Neill, I will ask you, during the time that you was working upon these tracks, what was the habit and custom of those particular engines *was* as to warning employes of the road?

A. There generally was *an* switchman along with the engine—sometimes three, one at each side, and they would warn those men working upon the track to clear out or get away from there; they

were coming in. Sometimes the engines would stop, and the switchmen run ahead and tell the parties that were there that they were coming in.

Q. Were you a car repairer?

A. No, sir.

Q. What is the distinction between a car finisher and a car repairer or car repairers?

A. The car repairers are those who look over the wheels and running work of the cars when they come in at depots where they stop, and before they proceed further they look them over, and if they find a broken wheel or a cracked wheel or anything of the kind they set them out.

Q. That is, men that go along with the hammers and tap the wheels?

A. Those are car repairers.

Q. That was no part of your duty?

A. No, sir.

Q. How do those car repairers work with reference to being more — one or two together?

Objected to.

51 A. I will ask whether or not *on*, when you were sent upon the tract to do work, such as you were doing this day, whether you were furnished with — second man to look out or assist?

A. No, sir; I was not.

Q. Then, if I understand you, while you were doing the work there was no one to look out for you?

A. No, sir.

Q. I mean no second assistant employe with you?

A. No, sir; only myself.

Q. Were you furnished with any flags or signals to indicate where you were at work?

Objected to as immaterial and foreign to the issues.

Cross-examination:

Q. When did you first commence working for the Northwestern Co. at Clinton, Mr. O'Neil?

A. 17th Nov., 1865.

Q. Where did you work?

A. I worked in the coach-shop working on coaches.

Q. Was that the same shop you were at work in when you got hurt?

A. Yes, sir.

Q. How long did you work for the company at that time?

A. That time I was, I think, 18 months or so working on my own responsibility. Worked contracting, and I worked for the superintendent, J. B. Howe.

52 Q. I simply want to know, Mr. O'Neil, about your work at Clinton there, in the shops and yards. I do not care about your work for Col. Howe outside of that.

A. I worked for myself 18 months. I worked for the officers of the road pretty near 12 months, and the balance for the company.

Q. That was away from Clinton?

A. Part of it was in Chicago.

Q. When did you commence work in the shops again there at Clinton?

A. I commenced in May, 1873, again.

Q. How long did you continue to work in the shops at that time?

A. From that time until the time of the injury.

Q. The injury was in 1877?

A. Yes, sir.

Q. You had worked in the shops, then, prior to that injury about six years, hadn't you?

A. Oh, more than that; there was from 1865 to 1877, 12 years; I was out about four years; about 8 years it would be.

Q. How far were these shops located from the main line where the trains passed to and fro?

A. They were right in the inte-section of those tracks, where the business flowed both sides of the shop; not through traffic.

Q. How far were they from the line for through traffic?

A. The end of the shop was facing towards the depot, or nearly so, and about 8 rods or so from it.

Q. 8 rods from the main line for through traffic?

A. Yes, sir.

53 Q. That was so all the time you worked there?

A. Yes, sir.

Q. Now, on this particular morning that —, did you take your ladder from the shop when you went to put on the brackets?

A. Yes, sir.

Q. And the brackets you made at the shop?

A. Yes, sir.

Q. Now, I understand you that when you got up there you found this block too thick?

A. Yes, sir.

Q. And what did you do before you put it on, take a little off this, where?

A. Took the screws out of both, the hook and the bracket, and cut off them and bored the holes over and screwed them together again and put them on.

Q. Unscrewed the piece you put on and took off a piece of this shoulder on each block?

A. Yes, sir.

Q. What did you do it with?

A. A chisel.

Q. The block was pine, I suppose?

A. The block was oak.

Q. Did you take that off all three blocks at one?

A. Yes, sir.

Q. Where were you when you did it?

A. On the southeast corner, at the corner of the car, on the platform.

Q. That is where you put on the first bracket?
A. Yes: on the same corner.
Q. Then you went over on the north side and put on a bracket on the northwest corner?
A. Yes, sir.
54 Q. And then came back on to the south side?
A. Yes, sir; and took the broken part off, and was about to put the other one on.
Q. About how high was the eaves of that car from the ground?
A. Somewhere in the neighborhood of 12 feet.
Q. Was your ladder long enough to reach to the top of the car?
A. No, sir.
Q. How much did it lack of it?
A. When set in a slanting position lacked 18 inches of it.
Q. About how long was the ladder?
A. About 12 feet; lacked so much as to make the other leg of the triangle.
Q. This diagram of the side of the car that you have referred to, when was that made?
A. That was made shortly after the next spring, as soon as I could get out, in March, I think; that is the eaves, and that is the ladder, about 18 inches.
Q. Does this cut represent the bottom of the window?
A. Represents part of the recess of the window; that is the top of the window.
Q. How much space is there between the top of the window and the eaves?
A. About the depth of the plate, about six inches; the windows in those old cars they finish up with a plate.
Q. How long was this made after the accident occur-ed?
A. The March following.
Q. What was the date of the injury?
55 A. 18th of October, 1877.
Q. You saw the car prior to making that diagram?
A. No, sir; I did not; I believe that was the first time I was out; I was helped out that time by my father.
Q. And made it from the inspection of the car at that time?
A. Yes, sir.
Q. Measured it, did you?
A. My father measured it, but I put it down.
Q. I would like to ask you if these two dots here show accurately the distance that the top of your ladder was from the top of the car?
A. Yes, sir; that is in a line with that.
Q. From this dot up to the line across the top that represents the distance from the dot up to the place, and the plate running up the eaves was six inches higher?
A. Yes, sir.
Q. So that the top of your ladder then stood 18 inches below the eaves of the car?
A. At the place where the car stood.

Q. Did you say, Mr. O'Neil, that you looked down the tracks to see what condition the switches were in before you went on your ladder the last time?

A. I looked down; yes, si ; everything was there just as it was.

Q. You looked at the switches?

A. I didn't go down to the switches.

Q. Could you see them?

A. I could see the tracks.

56 Q. And could see that the switches had not been changed.

A. The switches you could not notice, but the tracks were visible.

Q. And you looked there to see?

A. I looked down there, and in looking down saw the whole thing.

Q. How many times did you do that while you were at work on these brackets?

A. After Whitty spoke to me and went down I noticed three men going down that same track towards the tool-house; I looked after them again before I went up the ladder.

Q. But you went up on the north side and put up the bracket there and put on the bracket at the southeast corner?

A. And left the extra bracket that I had on this platform to come around with my ladder from the west side, facing east; I could take in the whole thing; went up to this step; took the brace on my arm and went up.

Q. Did you look up there before going on the ladder to see whether the tracks had been changed?

A. Yes, sir.

Q. That is what you were looking for?

A. That is certainly what I looked for.

Q. What was the occasion for making that examination?

A. I always make that examination; we imbibe that in us, men that work as long as I did.

Q. So you could see whether anything was likely to come in on the track?

A. Yes, sir.

57 Q. You knew they were likely to come in any time?

A. No, sir. I was not sure of that. I must abide by my instructions.

Q. I did not ask you what you were sure of. You knew they were likely to come in at any time?

A. Not without warning me. After the tracks were placed in such a position I did not expect any cars were going to come in without my being warned.

Q. What do you mean by being warned?

A. Being warned that they were coming in.

Q. Suppose you had seen an engine coming up with that car, and come onto the track, and heard the bell ringing, would that have been a warning to you to get down?

A. No, sir.

Q. Do you mean you would have stayed there with the car com-

ing in and the bell ringing, coming up that track and coming towards you, and would not have got down?

A. They are liable to go up on the other track.

Q. Answer my question.

A. Not without being warned.

Q. If, then, you had seen the car coming up and the locomotive pushing it, with the bell ringing, pushing it up towards the cars where you were at work, you would still have stayed there?

A. No, sir; I would not.

Q. Oh, you wouldn't; I thought you wouldn't; you would have got down, wouldn't you?

A. Certainly. Yes, sir.

58 Q. If you had seen the engine coming up from the main track on the cut-off, pushing a way-car, with the bell ringing, what would you have done?

A. I would not have went up at all.

Q. If you had seen them after you were up?

A. I would have came down if I was sure they were coming upon that track.

Q. Suppose you had seen them on the cut-off, with the bell ringing?

A. If I saw them on the cut-off then I would have been nearer the end of the cars to see them. I should have been down two cars more in order to see.

Q. Well, would you have gone down?

A. Certainly, if they were coming on the track.

Q. If, then, you had seen them on the cut-off, and heard the bell ringing, would you have watched for yourself to see what they were going to do?

A. Except they were far enough up the track to know they were going on the cut-off.

Q. That they were not coming in on No. 2, otherwise you would have watched out for yourself?

A. Yes, sir.

Q. You would have considered that your duty?

A. Yes, sir.

Q. Now, you were up there putting on the bracket, the last bracket; how did you stand on the ladder?

A. Stood partly turned, quartering, with my feet upon the round and my back, or at least the back of my head, towards the east, facing the west—nearly facing the west.

59 Q. The track there runs about due east and west?

A. I think so; yes.

Q. That is what you call it?

A. That may be a little north of west.

Q. As you stood square on that ladder you would face north?

A. Yes, sir.

Q. Now, did you have both your feet on the same round of the ladder?

A. Yes, sir.

Q. How far in did you have your feet on the ladder?

A. A little back of the ball of the foot, as far as I can judge now; that is where I stand to be secure.

Q. That was your usual way of standing?

A. Yes, sir.

Q. Now, standing there in that situation, suppose this to be north; I understand you to say that you was facing the west like this?

A. The ladder stands against here; I was standing a little quartering on the round, in this way (indicating), east and west.

Q. Now, if while you were standing there you had heard a bell ringing to your right, and had wanted to look and see what was coming, was there any trouble in your looking and seeing?

A. No, sir; there was no trouble. I might have to lean a little—might — from standing up from the perpendicular to see it.

Q. You could easily look around over your shoulder and see what was coming?

60 A. If I heard the bell ringing; yes, sir.

Q. You could without hearing the bell ringing if you had seen fit to do so, couldn't you?

A. Oh, yes.

Q. I think you say you were up on the ladder the last time two or three minutes all together?

A. Just as long as it would take to take out two screws and break off two.

Q. You gave your judgment?

A. About two minutes.

Q. During all that time you did not look down the track to see what was coming?

A. I don't think I did during that time. I looked before going up.

Q. I believe you already testified the day was a pleasant day?

A. It was a day about like this, and the wind about as it is to-day.

Q. Which way was the wind?

A. I think the wind was a little southwest or thereabouts.

Q. Did you hear any bells ringing while you were at work?

A. I heard some bells ringing; yes, sir.

Q. What bells did you hear?

A. The bell of the passenger as she was coming in west of me. I got down from my ladder; I was then on the north side; I heard the bell of another engine somewhere down in the west end of the yard.

Q. Where were you when you heard that?

A. I was there at the car.

Q. That was over in the west part of the yard, was it?

61 A. It was way down in the west part of the yard somewhere.

Q. Some distance away?

A. Yes, it must have been. I could hear them bells very distinctly, and if the other one was ringing I could have heard it.

Q. Your hearing was good?

A. My hearing was very good; yes, sir.

Q. If the bell of the engine that struck the cars had been ringing as it came up, could you have heard that?

A. If it was ringing, most certainly I would have heard it, if it was ringing.

Q. How far was the last switch that the engine run over in coming onto this west side track; how far was that switch east from where you were at work?

A. Well, I could not tell exactly now without referring. My head is bad now; I cannot recollect.

Q. Was it in the neighborhood of 80 feet?

A. I think about 80 or a hundred feet, as near as I can recollect.

Q. Does an engine coming over a switch make some clack and clatter?

A. Sometimes, unless they are very oily ones. If they are gummed up they do not make that great noise, especially if the joints are gummed up with oil.

Q. The engine did come up to that way-car track; there is no doubt about that?

A. There is no doubt about that.

62 Q. If you had been listening, Mr. O'Neill, could you have heard the engine coming up with that car where you were at work?

A. Without some notice I do not think I could have heard.

Q. You think it could have come up without your hearing it?

A. Unless the bell was ringing.

Q. If you were listening——

A. If I knew they were coming.

Q. If you were listening for them, you could have heard?

A. Oh, yes; most certainly.

Q. Won't you look at this diagram and see if you think that is a correct plat of the tracks, their position, showing the tracks at the point in the yard where you were injured correctly, as they were at that time, with the cut-off here?

A. This track I have no remembrance of.

Q. The way-car track was next the main line?

A. Yes, sir.

Q. Do you remember how many tracks were north of the way-car track?

A. One at that time.

Q. Does this diagram show correctly the cut-off from the main line up onto the way car No. 2?

A. Yes, I think that is it, pretty near.

Q. You were, as I understand you, just west of the cut-off?

A. Yes, sir. There is a great many alterations since I was injured. The switch is taken up.

Q. I suppose you were stunned by your fall, weren't you?

A. Partly for a little while; I think so. Yet I became

63 conscious of the cars moving when I was down. They were still moving when I came to.

Q. You spoke of your ladder; was it thrown over onto the main line?

A. It was thrown lengthways with the cars, a little inclined to the main line, and I was lying at the end of the ties of the main line.

Q. You were conscious enough to note that fact yourself at that time?

A. I was conscious enough to know it. After I fell there was some little time I was unconscious; a very short time, I think.

Q. I want to know if you noticed the way the ladder lay yourself?

A. I did, particularly. The first man that came from the west lifted me to a sitting posture, and I saw the ladder lying in that manner a little distance from the main track, and about 8 or 10 feet from me.

Q. I understand the ladder was east of you?

A. Yes, sir; when I was lying upon the ends of the ties my head was east, and the ladder was towards my head; when the man lifted me up to a sitting posture I saw the ladder 8 or 10 feet from me, and the end of it seemed to be kicked in under the car, or nearly, and leaning towards me. The end that was near the main line rail was kicked under the car.

Q. How far west were you from the west end of the ladder?

A. About 8 or 10 feet; the foot of the ladder was against the track, or the rail of the main line track, when I was lifted to a
64 setting posture; the end of the ladder that was against the rail was shot over by the tracks of another car.

Q. Now as you stood on the ladder while you were engaged in taking off that bracket, how far was that from the ground?

A. Maybe six feet. I would have to get up. I would not have to stand up straight; kind of stooping.

Q. Did your head come up to the eaves of the car?

A. I should think somewhere about that. I would be a little *might* stooped.

Q. How tall a man are you?

A. 5 feet five, I believe, when I was under United States service.

Q. The car, you say, is 11 feet?

A. The car is nearly 12 feet from the ground. At that time it would not be so high from the wheels, but the rail at that time was about the ground.

Q. Well, if you had seen a car coming while you were at work there and wanted to get down, you could have done so very quickly couldn't you?

A. Yes, sir; I would be down very quick.

Q. How long would it take you?

A. Half a second, if I was inclined to come down very quick, because I could spread my legs on the sides of the ladder and slip down. I have done it sometimes, not in case of danger, but in the shop when working on the roof.

Q. It was a very simple and easy thing to have come down if you had wanted to have done it?

A. Yes, sir.

65 Q. I think you say that you had got the screws out and broken off?

A. Yes, sir.

Q. Did it take any considerable degree of force to take the screws out?

A. Yes, some; not after I got that long screw-driver; in turning with the brace the leg of the ladder would be in the way; afterwards I used that long screw-driver, after I got them started.

Q. The screws you took out were just driven into pine?

A. Yes, sir; and into oak.

Q. And the other screws were in the oak block?

A. In the oak cornice; but they were not as long screws as the bottom.

Q. The others were the screws that held the top?

A. Them I broke off, because you can break them off in oak very easy, because they do not tear any out.

Q. You had just shifted your position, then, before the cars struck and you were thrown?

A. Just shifted the position.

Q. Stepped up and back?

A. Just stepped up and got hold of the hammer in one hand and the screws in the other hand when I was struck.

Redirect examination:

Q. I don't know whether I understood you correctly, but I understood you to say you got out and made this drawing in the month of March following the October in which you were hurt.

A. Yes, sir.

Q. I also understand you to say you did not go out of the house until June.

66 A. That is to walk about; I was helped out by my father and another man to get that; I had enquiries made; I heard there were such marks, and I had them help me out.

Q. You still repeat what you said, that before you was able to get out and go about was in June?

A. The first I was able to go out and go alone was in June.

Mrs. MARY O'NEIL sworn for plaintiff.

Q. What is your first name?

A. Mary.

Q. Are you the wife of John M. O'Neil?

A. Yes, sir.

Q. Where do you live?

A. In Clinton.

Q. How long have you been married to Mr. O'Neil?

A. 23 years.

Q. Have you lived with Mr. O'Neil during the time he has resided in Clinton?

A. Yes, sir.

Q. You may state to the jury who has taken care of Mr. O'Neil since the time he was injured in 1877.

14 Q. State, if you know, if the plaintiff was in the habit of being sent to repair cars on the tracks in the yard.

Ans. He was.

15 Q. Did you switch any car upon the track where the plaintiff was working just before his injury?

Ans. I went in on the track with a car.

16 Q. What kind of car?

Ans. Way car.

17 Q. Was it what was known as an east or west end car?

Ans. I do not know; think it was a west end car.

18 Q. Who was in charge of engine at this time?

Ans. I do not know.

19 Q. Who was regular engineer?

Ans. Shoemaker.

71 20 Q. Who was fireman?

Ans. Riggs.

21 Q. How many switches did you turn to set car in on the track?

Ans. Three.

22 Q. State, if you know, whether the car when set in struck other cars standing upon the track, upon one of which pl'ff was working?

Ans. Yes; it struck them light, not very hard.

23 Q. Which side of car was pl'ff on?

Ans. South side.

24 Q. How far was these three switches from where pl'ff was at work?

Ans. Two of them was about seven or eight car-lengths, others twelve or fourteen, from where he was at work.

25 Q. Did you set the brakes on the cars after it passed the last switch?

Ans. No, sir.

26 Q. Were these three switches that you turned north or south of the track on which pl'ff was working?

Ans. Two of them were on north, one on south, one on main line.

27 Q. Is the ground covered by the tracks where these switches were turned & the track upon which pl'ff was working on level ground?

Ans. It is level ground all around there.

28 Q. Is there anything to obstruct the view between those switches and the place where pl'ff was working?

Ans. You could see him from two of the switches; one of them you could not.

72 29 Q. Do you remember of looking down to see whether any one was working on these cars or not?

Ans. Do not remember.

30 Q. You say that the third switch you turned was not in sight of pl'ff.

Ans. It was not.

31 Q. If you had not turned that switch, state whether or not the car would have passed north of the track upon which pl'ff was working.

Ans. It would.

32 Q. State whether or not the pl'ff could see the last switch you turned, by which the car was thrown against those on which he was working.

Ans. He could not.

33 Q. How frequently have you seen pl'ff & others repairing cars on track in yard?

Ans. Very often; every few days some one would be up there working.

34 Q. By every few days do you mean occasionally or every day.

Ans. Three or four times a week; a man alone to fix things.

35 Q. Did the engine enter the third switch on the occasion of the injury.

Ans. It did.

36 Q. Did you signal to the engineer when to go ahead, when to stop in setting this car on the side track?

Ans. I gave a signal on fireman's side to steady up; don't know whether any one seen it or not.

37 Q. That would be on south side of track?

73 Ans. Yes, sir.

38 Q. Were you opposite the engine or car at that time?

Ans. I was on the west end of the car.

39 Q. State whether or not the pl'ff was within view of the fireman during the time these switches were passed & also the engineer; when the engine was not bearing northward in crossing the tracks was there any obstruction to prevent their view as above indicated?

Ans. The fireman could see him; the engineer could not.

40 Q. What, if anything, was there to prevent the engineer from seeing him when on the main track?

Ans. There was nothing.

41 Q. Did you ride between the switches that you turned?

Ans. No; I run.

42 Q. Did you stay on car until it struck the other cars?

Ans. No; I got off about one car-length from it.

43 Q. Did you see the pl'ff when you got off?

Ans. I saw him about the time it struck; don't remember exactly.

44 Q. Do you know when you turned the 1st & 2d switch that you were going to set cars on track on which pl'ff was working?

Ans. I knew I was going in on that track after some way cars.

45 Q. Knowing that you were going in on that track and there being no obstruction to view at the 1st & 2nd switch- turned

74 on the track do you know why it was that you did not see the pl'ff working on said track?

Ans. Do not know why I didn't; I looked down that way, but did not notice any one; had not been notified that any one was going to work there.

46 Q. Did you go to pl'ff after he fell from ladder?

Ans. We came out with engine a short time after that and went down to where he was laying, when they said his leg was broken; I did not believe it; did not think he was hurt that bad.

47 Q. Had he been placed in wagon at time they said his leg was broken?

Ans. Do not think he had.

48 Q. Did the engineer get off the engine to assist him?

Ans. Do not know.

49 Q. Who did assist him?

Ans. Do not know.

50 Q. Who was around there?

Ans. Several.

51 Q. What was their names?

Ans. George Ellenwood, Mr Riggs, Mr. Shoemaker, & Mr. Furlong & several other men; do not know who they were.

52 Q. Do you now remember that Mr. Shoemaker was there?

Ans. He was there.

53 Q. Was he on the engine when you ran in on that track?

Ans. Could not swear whether he was or not; was not on that side.

54 Q. When you turned the last switch were you not on the engineer's side?

75 Ans. I was for a minute; then got on end of way car.

55 Q. After opening the switch did you signal to the engineer to come ahead?

Ans. I gave a signal to come ahead as soon as I got switched over.

56 Q. Who was you signaling to?

Ans. To whoever was running the engine.

57 Q. Where was your father that day?

Ans. He was laying off.

58 Q. Was he the principal switchman for that engine?

Ans. He was.

59 Q. You had taken his place on account of his laying off, had you?

Ans. I was doing part of his work & my own too; there were two of us working with the engine.

Cross-examination waived.

(Signed) FRANK WILD.

Sworn to before me and subscribed in my presence by the said F. Wild, this 19th day July, 1878.

Signed ED. D. MURPHY, *Commissioner.*

76 ALEXANDER RIGGS, being produced, sworn, and examined on the part of plaintiff, deposed as follows:

1 Q. State your name, age, residence, and occupation.

Ans. Alexander B. Riggs; 42 years; Lyons, Iowa; fireman on switch engine on C. & N. W. R. R. Co.

2 Q. How long have you been in employ of defen't?

Ans. Think about eight years.

3 Q. Do you remember of the pl'ff, Mr. O'Neil, receiving some injuries in the yard of the C. & N. W. road at Clinton on or about Oct. 18, 1877?

Ans. I do.

4 Q. Were you fireing on switch-engine that day?

Ans. Yes, sir.

5 Q. Who was running the engine at the time of the injury to Mr. O'Neil?

Ans. Mr. Shoemaker, the regular engineer.

6 Q. How was Mr. O'Neil injured on that occasion; how did the accident occur?

Ans. We were coupled onto a way car, and in going in on this side track where the rest of way cars were—that is, we were heading in this way car, — was ahead of us, to get some other way cars to set them over on the track south of the main line, where they make up all western-bound trains. When we went in there was just a way car ahead of us, and before we got quite to the other way cars. I saw some person on the side of the way car on the ladder. We struck the way cars with the way car we had. When we struck them he fell; that is the way he got hurt.

77 7 Q. Do you mean to be understood that in striking the way cars that the car on which pl'ff was working was moved, thereby throwing down the ladder on which he was standing.

Ans. I should say it was. If there had been a brake set I should say not. Could not say that the car moved; had car ahead of us.

8 Q. According to your best judgment, did the striking of the cars knock his ladder down?

Ans. That is [a] pretty hard question for me to answer. If there was no break set it would; if break was set it would not.

9 Q. How far did engine move after striking?

Ans. Probably a couple of feet.

10 Q. If the brake was set on the car, in your judgment, would the concussion jar the ladder resting against it, thereby causing the fall?

Ans. Don't think it would.

11 Q. You don't know whether brakes were set or not?

Ans. No; I do not.

12 Q. For what distance down the track over the route you passed could pl'ff be clearly seen?

Ans. He could be seen from my side of the engine ten or twelve cars.

13 Q. How much is a car length?

Ans. About 28 feet, inside measurement.

14 Q. How far is it from buffer to buffer on way car on your road?

Ans. [I] suppose it to be 30 feet.

15 Q. For what distance did you see the pl'ff on the ladder on that occasion?

78 Ans. About a car length from the cars that stood on the track.

16 Q. Had you observed him before that time?

Ans. No, sir.

17 Q. Do you remember whether the coupling was made the first time you struck the way cars?

Ans. Yes, sir; it was.

18 Q. How did you strike them, light or heavy? Was your engine running rapidly or slowly?

Ans. It was running slowly and struck them light.

19 Q. At what rate, in your judgment, was — engine running after passing the switch nearest the cars?

Ans. Three miles per hour, & that is fast to make a coupling.

20 Q. Do you think you were running fast when you made the coupling?

Ans. No, sir; I do not.

21st Q. If three miles is fast to make a coupling & you were not running fast when the coupling was made, in your judgment, were you running less or more than three miles an hour?

Ans. I should say less.

22 Q. What do you say about two miles; were you running less or more than two miles per hour?

Ans. Not more than two miles an hour. The engine had been shut off and thrown back, and then thrown ahead again.

23 Q. At what particular point was steam shut off?

Ans. About a car length from the car that was ahead of us.

79 24 Q. On what car of those standing stationary was pl'ff working?

Ans. On the third way car from our engine, of those that were standing on the track.

25 Q. Did your engine stop when she was thrown back?

Ans. No, sir; not quite.

26 Q. How near was the car attached to your engine to the first stationary car at the time she was thrown ahead again?

Ans. About four feet.

27 Q. And you say you saw the pl'ff about a car length, or 30 feet, before the car struck?

Ans. Yes, sir.

28 Q. Who was handling the engine?

Ans. The engineer.

29 Q. When you saw the pl'ff on the stationary cars, and your running in that direction within 30 feet of striking, did you state that fact to the engineer?

Ans. No, sir.

30 Q. Didn't you speak to [the] engineer?

Ans. Yes, sir.

31 Q. What did you say to him?

Ans. I just said whoa.

32 Q. What did you say whoa for?

Ans. I was going to tell him to stop; that there was a car repairer on a ladder on the side of a car, but before I could say any more he got a signal on his own side of the engine to come ahead.

33 Q. When you said whoa had he turned his engine back?

80 Ans. He did just as soon as I spoke to him.

34 Q. How far did the engine run after he turned her back before he turned her ahead again?

Ans. About half a car length.

35 Q. After you told him to stop and he turned the engine back, would the cars have struck if he hadn't turned her ahead again?

Ans. I don't hardly think they would.

36 Q. How do you know the engineer got a signal from his side?

Ans. I heard somebody say come ahead.

37 Q. In what distance can an engine of the character of the one you were then on, pushing one empty way car & running at rate of two (2) miles an hour, be stopped?

Ans. I could stop her in 4 feet.

38th Q. Did you see the pl'ff fall when the cars struck?

Ans. I saw a man fall?

39 Q. Did you afterwards learn that that man was the pl'ff?

Ans. Yes, sir.

40 Q. Did his ladder go down under him?

Ans. It looked to me as though it did.

41st Q. Do you wish to be understood that the engineer shut off steam & reversed the engine or threw her back as soon as you said whoa?

Ans. Yes, sir.

42d Q. Then, if you had the 30 feet to run after you saw the danger of pl'ff, why didn't you tell the engineer there was a man on the side of the car?

81 Ans. Because he had got a signal to come ahead on his own side.

43d Q. Then you intended to tell him if he had not received a signal from the other side?

Ans. Yes, sir; that is part of my business, to look out for danger.

44 [Q]. State whether or not it is a part of your business as fireman to look out ahead and warn the engineer of approaching danger?

Ans. Yes, sir.

45th Q. If you had 30 feet to run before striking, & was within four feet of striking at the time the engineer turned his engine ahead again, you must have run about 26 feet after telling the engineer to stop.

Ans. I don't think I said that when I first saw Mr. O'Neil, but shortly afterwards.

46 Q. State whether or not you informed the engineer of the danger of Mr. O'Neil immediately on seeing his danger.

(Objected to on [the] ground that the question assumes that the witness had seen that O'Neil was in danger by defendant.)

Ans. No, sir, I did not, because I was ringing the bell and I thought Mr. O'Neil saw me.

47th Q. If you thought Mr. O'Neil saw you why did you say whoa to the engineer?

Ans. Because I wanted to see whether he was going to get down or go on up.

48 Q. When you said whoa, state whether or not you meant that the engineer should stop the engine?

Ans. I did.

82 49 Q. Did the engineer so understand it?

Ans. I suppose he would if he had not got signal on [the] other side.

50 Q. State whether or not he didn't so understand it, and immediately shut off steam and threw the engine back.

Ans. He did, for he shut her off and threw her back.

51 Q. And the cars wouldn't have touched, according to your best judgment, if he hadn't sent her ahead again?

Ans. No, sir.

52 Q. Do you know Frank Wild, a switchman then employed by defendant?

Ans. Yes, sir.

53 Q. Did he do the switching & coupling on that occasion?

Ans. He made the coupling between the car we had and the car standing on track.

54 Q. Just before he made the coupling, and after passing the last switch, state whether or not you saw him signaling on fireman's side to steady up.

Ans. Did not see him until after he made the coupling.

55 Q. State whether or not the car would have been thrown upon the track where pl'ff was at work had not the last switch been opened just prior to making coupling?

Ans. If that switch hadn't been turned it would have gone on track to the north.

83 Cross-interrogatory:

No. 1 Q. Were you ringing the bell when you passed off from the main line?

Ans. Yes, sir; I was.

2d Q. Did you continue to ring [the] bell till [the] engine stopped?

Ans. I did.

3 Q. Were you able to see the car on which O'Neil was working all the way from the main-line switch to the place where the engine stopped?

Ans. No, sir.

4 Q. Whereabouts could you not see the car?

Ans. In the curve between the switches, between the first and second switch-; [at] no other place after passing over [the] second switch.

5th Q. How much distance was that?

Ans. Two car lengths, or 60 feet.

6th Q. State why you could not see O'Neil's car when you were at that point.

Ans. Because the car that was ahead of [the] engine cut off my view of that car.

7th Q. There was nothing to prevent O'Neil's seeing your car and engine the whole distance, was there?

Ans. No. sir.

8th Q. By simply looking in the direction from which your car & engine [were] coming O'Neil could see the car and engine all the

way from the main-line switch to the place where the coupling was made, could he not?

Ans. Yes, if he looked; but he was working.

84 9th Q. How do you know he was working at the time you left the main line?

Ans. I did not see him; don't know whether he was working or not.

10th Q. Do you know whether he was working when you passed the second and third switches?

Ans. I saw him make a move, & suppose he was working.

11 Q At what point was that?

Ans. About the time we passed the third switch.

12th Q. That was the point where you first noticed him, was it?

Ans. Yes, sir.

13th Q. Where was he and what did he appear to be doing when you first saw him?

Ans. Standing on [the] ladder on [the] side of [the] car; don't know what he was doing.

14th Q. How far up the side of the car was he standing when you first saw him?

Ans. With his breast about even with [the] roof of [the] car.

15th Q. Did you continue to look at him until the engine and car stopped?

Ans. [To the] Best of my knowledge, I think I did, except when I told the engineer to whoa.

16 Q. [To] The best of your knowledge, you believe you were looking at him all the time from the time you first saw him until the engine stopped, except when you spoke to the engineer & said whoa?

A. Yes, sir.

85 17th Q. During that time your engine ran from about the third switch to the stationary cars, a distance of how many car lengths?

Ans. I thought it was only four or five car lengths. I think it was 4 or 5 car lengths.

18th Q. During all that time were you ringing the bell of the engine?

Ans. Yes, sir.

19th Q. While you were running that distance did Mr. O'Neil look in the direction toward you to your knowledge?

Ans. Can't say.

20 Q. Did he change his position on the ladder all that time?

Ans. I think he did once.

21 Q. What did he do?

Ans. It looked to me as if he was going to get down.

22nd Q. You suppose then from his movement that he had noticed the engine coming and was getting down?

Ans. Yes, sir.

23 Q. How far down the ladder did he move?

Ans. Saw him make a move; supposed he was going to get down; whether he got down or up I can't tell you.

24th Q. Refresh your recollection and see if you can't remember that he had gone more than half way down the ladder before the cars came together.

Ans. Only way I can answer that question is to say where he was standing on the ladder would be about half way up, and the move that he made I supposed he was going to get down.

86 25th Q. How far from the ground was the round of the ladder on which he was standing?

Ans. About six feet.

26 Q. What was the next motion that you saw him make?

Ans. He fell.

27 Q. Which way did he fall?

Ans. On south side of car, away from the car.

28 Q. What came of his ladder?

Ans. From what I could see of it after they were down on the ground it looked to me that he was under the ladder with one leg run through between the rounds.

29 Q. O'Neil and the ladder fell away from the car towards the south, did they?

Ans. I think they did.

30 Q. Then they did not fall alongside of and parallel with the car?

Ans. Not that I see.

31 Q. Were you looking at him when he commenced falling?

Ans. I was.

32 Q. Now, can you state whether the car on which he was working moved at all when your car struck the first standing car?

Ans. No, sir; I could not.

33 Q. If the car on which he was at work had been thrown forward by the concussion, would it not have carried him and his ladder in the same direction?

(Objected to by plaintiff as calling for an opinion or conclusion rather than a statement of a fact and in relation to a
87 matter in which the witness is not shown to be an expert.)

Ans. Would suppose it would.

(Plaintiff moves to strike the last above answer, being incompetent, irrelevant, and irresponsive, and as being a mere supposition on the part of the witness.)

34 Q. As soon as the coupling was made of the car attached to your engine to the first standing car did you back right off of that track?

Ans. No, sir.

35 Q. What did you do?

Ans. Made some more couplings of way cars, three or four.

36 Q. Who made the coupling?

Ans. The switchman, Mr. Weld, & Mr. Ellenwood.

37 Q. Where was Weld when the cars came together?

Ans. In between the car with engine & the other car making coupling.

38 Q. Where was Ellenwood?

Ans. He was on engineer's side of way cars, north side; don't know whether he coupled any cars or not.

39th Q. Now, after the first coupling was made was the engine moved forward in order to make the other couplings?

Ans. It was.

40th Q. Who gave the signal for the engineer to come ahead?

Ans. Don't know; it was given on engineer's side.

41 Q. Do you know whether any of the brakes were loosened on the way car before starting out?

88 Ans. I do not.

42 Q. When you told the engineer to whoa, after seeing O'Neill on the car, didn't you tell him that there was a man at work on the car?

Ans. I didn't tell him till after the signal was given on his side to come ahead.

43 Q. If I understand you, then, when you first saw O'Neil on the car you told the engineer to whoa?

Ans. No, not when I first saw him; we had got about half way to the car from the switch.

44 Q. Then the engineer shut of- steam and reversed the engine?

Ans. Yes, sir.

45 Q. Did the engine then come to a stop?

Ans. Not to a full stop.

46 Q. How far did she run before you heard the signal given to the engineer to come ahead?

Ans. Should judge about 15 feet.

47 Q. How near at that time was your way car to the first standing car?

Ans. About half car length.

48 Q. Was it at that time that you saw O'Neill make the movement as if he were coming down?

Ans. Yes, sir.

49 Q. Is that the reason why you did not again tell the engineer to stop & that there was a man on the cars?

Ans. Yes, sir.

50 Q. Can you tell how long the engine was in running over the remaining 15 feet?

89 Ans. Don't think I could.

51 Q. At what rate of speed do you think she was running?

Ans. About two miles an hour.

52 Q. You think the two cars came together very light?

Ans. Yes, sir.

53 Q. In your judgment did they come together hard enough to start and move three stationery way cars?

Ans. They would if there was no brakes set.

54 Q. When you are on an engine and it comes against standing cars can you tell from the movement of the engine whether the brakes are set or not?

Ans. Not at all times.

55 Q. After the engineer received the signal to come ahead would there have been sufficient time to stop the engine before the cars came together if you had told him again stop?

Ans. I think not.

Re-direct examination:

1st Q. Before being sworn as a witness to-day did you have any conversation with the plaintiff, or any attorney acting for him, in regard to your testimony in this case?

Ans. No, sir.

2 Q. Before being sworn to-day have you at any time been examined by Major Bailey, attorney for defendant, or any of the
90 officers of the defendant, in regard to the facts in this case?

Ans. By Major Bailey and an officer of the company.

3 Q. At what place?

Ans. In Major Bailey's office, Clinton, Iowa, I made a statement of the facts in the case.

4 Q. Were you questioned by these gentlemen in regard to certain matters affecting this case?

Ans. I was asked to make a statement, and asked me questions.

5 Q. Do you mean to say in answer to cross interrogatory No. 17 that you saw pl'ff on the ladder while you run 4 or 5 car lengths?

Ans. Yes, sir.

6 Q. About how many feet would that be?

Ans. From 120 to 150 f't.

7 Q. And all that time you looked at him, except when you turned to the engineer and said whoa, did you?

Ans. Yes, sir.

8 Q. Are you quite sure it was 4 or 5 car lengths?

Ans. I should judge it was four or five car lengths.

9 Q. Now state whether or not you had abundant time while you were running that 120 or 150 feet, slowly, as you say, to tell the engineer about the pl'ff on the ladder.

Ans. Certainly I could if I had not thought he had heard the bell ringing and seen us coming.

10 Q. Now if you are sure you saw him 4 or 5 car lengths before the cars struck please explain your answers to direct interrogatories 15 & 27.

91 Ans. That was the time I told the engineer to whoa.

11 Q. What did you tell the engineer about a man being on the car?

Ans. When I spoke to him to whoa he threw the engine over; he got a signal on his side to come ahead, and then I told him there was a car repairer on a ladder on the side of the cars.

12 Q. You are sure you spoke to the engineer about the car repairer, are you?

Ans. Yes, sir; but not before the cars struck.

13 Q. And yet you saw the danger from 120 to 150 feet away, did you not?

Objected to by defendant, for the reason that the interrogatory

assumes that the witness saw & believed that O'Neil was in danger, whereas the witness has not testified to such a fact.

Ans. I did.

14 Q. Was O'Neil's back or face to you, or do you know, as you ran towards him?

Ans. His side was from way he stood.

15 Q. At that time how many trains, passenger and freight, regular & extra, passed over the road each day?

Ans. About 20 trains per day.

16 Q. How many times back and forth did the switch engine run each day?

Ans. Some days not more than two dozen, other days from fifty to hundred.

17. Q. State whether the engines of all these trains and the switch engines ring the bell as they pass through the yard or
92 through the city of Clinton, or are they required to do so?

Ans. They all do, as far as I know; believe they are all required to.

18 Q. Do you sometimes use two switch engines in the yard?

Aus. Most of the time, sometimes three.

19 Q. Then there is almost an interminable and everlasting ringing of bells in the yard, is there not?

Ans. If business is good there is.

20 Q. Do you know whether business was good in October, 1877?

Ans. I believe it was.

21 Q. You say in substance that you would have told the engineer of pl'ff's being on side of the car, if you had not supposed that the pl'ff would get down. Now, what motion did he make from which you formed that conclusion?

Ans. Saw one of his legs moving and his hands.

22 Q. Did his legs move up or down?

Ans. Took it to move down.

23 Q. When a man is at work he sometimes moves his legs and arms, don't he?

Ans. Naturally suppose he would.

Recross-examination:

1st Q. When you noticed that O'Neil moved his legs and arm didn't you notice that he put his leg through the rounds of the ladder?

Ads. No, sir, I did not. Did not notice that until he was down on the ground.

2 Q. Are you sure that he commenced falling after the cars
93 came together, or rather did he not commence falling before the cars struck each other?

Ans. All I can say is from the move I see him make on the ladder, & supposed he was going to get down, & then he fell.

3 Q. Now, do you know that his falling was the result of the cars coming together or from his movement to come down?

Ans. I cannot say, because it was done so quick I could not tell.

4 Q. Do you know whether at the time that you made the statement that you testified to in Major Bailey's office, in Clinton, to him and an officer of the company, whether this suit had been commenced or not & whether negotiations for the adjustment of this claim were then pending?

Ans. I know that the suit was not commenced, but I heard that they were trying to settle the claim.

Redirect examination:

1st Q. Do you mean to be understood that you saw pl'ff four or five car lengths before you struck the standing cars, & didn't tell the engineer because you thought he was making a motion to come down, but when you got within one car length you signaled the engineer to stop, because at that time he was not coming down; is that what you mean by your testimony?

94 Ans. Yes; I mean there was four or 5 car lengths when he made the move to come down, and then when I came within a car length I saw he was not down.

2 Q. Then you didn't see him make a motion to come down after you got within a car length of him?

Ans. That is the time I did see him, not when I was in from four or five car lengths of him.

3 Q. Then the motion you speak of was when you were within one car length of the standing car?

Ans. Yes, sir.

4th Q. Did you see him make motions more than once by which you thought he was going to come down?

Ans. I did not.

(Signed) A. B. RIGGS.

Sworn to before me and subscribed in my presence by said A. B. Riggs this 19th day of July, 1878.

(Signed) ED. D. MURPHY,
Commissioner.

95 JOHN FURLONG, Jr., being produced, sworn, and examined on the part of the plaintiff, deposed as follows:

1st Q. State your name, age, occupation, & residence.

Ans. John Furlong, Jr.; age, 21 years; car repairer; Clinton, Iowa.

2nd Q. Were you in the yard of the C. & N. W. R. R., Clinton, Iowa, when the pl'ff, John M. O'Neil, received some injuries, on or about Oct. 18, 1877?

Ans. Yes, sir.

3. Q. How long had you known the pl'ff before that time?

Ans. Nearly 8 years.

4th Q. State if you know what his business was, & what compensation he received for his services per day.

Ans. He was carpenter for C. & N. W.; don't know what his wages were.

5th Q. How near were you to pl'ff at the time of his injury?

Ans. Don't know what time it happened; at the time I heard of it I was about 500 ft. away.

6th Q. Did you go where the pl'ff was after the injury?

Ans. I went to where he was carried.

7th Q. Where was that?

Ans. In telegraph office, 5th street, R. R. crossing.

8th. Did you assist in putting him into a wagon before he was carried home?

Ans. Yes, sir.

9th Q. State whether or not the time you were putting him into the wagon he had the use of his right leg?

Ans. Not to my knowledge.

10th [Q.] Do you know whether it was broken or not?

96 Ans. Do not know.

11th Q. State whether or not any one held his leg up to keep it from dragging while he was being placed in the wagon; and, if so, who held it.

Ans. I held it.

12th Q. Who deld the pl'ff after he was placed in the wagon?

Ans. I did.

13th Q. How did you hold him.

Ans. I had my arms under his arms, around his body. I was on my knees.

14 Q. State what occurred, if anything, after he was placed in the wagon?

Ans. The horse ran away.

15 Q. Where did he run and how far?

Ans. About 300 feet north and half the distance back.

16th Q. Was the wagon overturned or you or pl'ff thrown out?

Ans. It was not. We were not thrown out.

17 Q. Did you continue to hold the pl'ff till after the horse was stopped?

Ans. Yes, sir.

18 Q. State whether or not, to your knowledge, the pl'ff received any injnry by reason of the horse running away.

Ans. Do not know.

19 Q. What was done with pl'ff after the horse was stopped?

Ans. He was taken out of the wagon & placed on the ground, then he was carried into a house close by; then got another horse

97 and wagon and put him into that, — and taken home.

20th Q. Who procured the first wagon and ordered his removal?

Ans. Mr. Comstock, the yard-master, procured the wagon; don't know who ordered his removal.

21 Q. State, if you know, whether the carpenters employed by defendant, including pl'ff, were in the habit of working about and upon cars standing upon defendant's track.

Ans. They were.

22 Q. Do you know under whose direction they were?

Ans. I do not.

23 Q. Who was their foreman, if you know?

Ans. Mr. H. L. Preston, master car builder for C. & N. W. R. R.

24th Q. Do you know what track in defendant's yard was used for way cars, waiting their turn to go out?

Ans. Track No. 2, between the cut-offs.

25th. Please look at the plat now shown you, marked Exhibit A, & state whether the track upon which is represented ten cars is track No. 2 used for way cars.

Ans. Yes, sir; track No. 2.

26th Q. Is that part of track No. 2 used for the passage of teams or for freight cars standing upon the track?

Ans. It is not used for passage of trains, but for way cars only; sometimes they put in a bad order-car for car repairers to repair it.

Cross-examination waived.

(Signed) JOHN FURLONG, JR.

98 Sworn to before me and subscribed in my presence by the said John Furlong, Jr., this 20th day of July, 1878.

(Signed) ED. D. MURPHY,
Commissioner.

JOHN BROWN, being produced, sworn, and examined on the part of plaintiff, deposed as follows:

1st Q. State your name, age, residence, and occupation.

Ans. John Brown; 31 years; Clinton, Iowa; car repairer for defendant.

2nd Q. Are you acquainted with the pl'ff, Mr. O'Neil?

Ans. Yes, sir.

3rd Q. Are you in employ of defendant, the C. & N. W. R'y Co.?

Ans. Yes, sir.

4th Q. Were you in employ of defendant at the time the pl'ff received some injuries, on or about Oct. 18, 1877?

Ans. I was.

5th Q. Where were you at the time he received the injury?

Ans. Don't know exact time he did receive it.

6th Q. Where did you see him first after he was injured?

Ans. I saw him on south side of track—south side of No. 2—also known as the way-car track.

99 7 Q. What condition did you find the pl'ff in when you came up the track?

Ans. He was in a kind of setting posture.

8 Q. Did you see the ladder near him?

Ans. No, sir.

9 Q. How far was pl'ff from the south rail of No. 2?

Ans. Five or six feet; can't exactly tell.

10 Q. Did you assist in removing pl'ff?

Ans. I did.

11 Q. State whether or not he appeared to have the use of his right leg.

Ans. Don't know whether he had or not.

12 Q. Did he walk on it?

Ans. No, sir.

13 Q. How was he taken away?

Ans. He was picked up by men and carried into the telegraph office.

14 Q. How long have you known the pl'ff, and how long have you worked with him in the yard of defendant at Clinton?

Ans. Know him about 7 or 8 years; never worked with him.

15 Q. I mean how long did you both work for the company at same place?

Ans. I must have been with company eleven years; don't how long he worked for it.

16 Q. Have you been in habit of seeing pl'ff & other carpenters working upon or about cars on the track in defendant's yard?

Ans. Yes, sir.

17 Q. Did you see the collision of the cars at the time pl'ff was hurt, or see pl'ff fall to the ground?

100 Ans. No, sir.

Cross-examination waived by the defendant.

(Signed) JOHN BROWN.

Sworn to before me and subscribed in my presence by the said John Brown.

STATE OF IOWA, *Clinton County:*

I, Ed. D. Murphy, commissioner, duly appointed by the parties in this case to take evidence therein, certify that, in pursuance of the annexed stipulation, I caused to come before me at my office in room 6, same block, Clinton, Iowa, Frank Wild and Alexander B. Riggs, on the 19th day of July, 1878, and John Furlong, Jr., John Brown & Dr. H. S. Farnsworth, on the 20th day of July, 1878, who were then and there by me sworn & examined, and such examination reduced to writing by me, and after by me read over to the said witnesses the same were subscribed & sworn to by them, respectively, in my presence, and their depositions are now herewith returned, and I further certify that W. A. Foster and John J. Mullany, attorneys for plaintiff, and E. S. Bailey, attorney for defendant, were present during all of said examination.

Given under my hand this 20th day of July, 1878.

(Signed) ED. D. MURPHY, *Commissioner.*

101 Commissioner's fees, $17.60.

(Signed) ED. D. MURPHY.

OCTOBER 11, 1878.

FRANK WILD, being recalled by plaintiff & duly sworn, testified as follows:

No. 1. From the time you entered the main track until you went in on No. 2 with the car you have mentioned how many switches did you say you set?

Ans. Three, I think.

2 Q. These switches—were they north or south of No. 2? And state which north, if any, and which south.

Ans. The first two were south of No. 2 & the last was north of No. 2.

3 Q. Whereabouts did you enter the main line with the car?

Ans. Do not remember.

4 Q. After you left the main line was there anything to prevent the fireman from seeing Mr. O'Neil?

Ans. There was not.

5 Q. Where were you at 9 a. m. that morning?

Ans. Do not remember.

6th Q. Where were you when the morning passenger train went east; where did it pass you?

Ans. Do not remember.

7th Q. Did you hallo*a* to the fireman before Mr. O'Neil fell?

Ans. Think I did.

102 8th Q. Whereabouts were you at that time?

Ans. I was on the ground a few seconds before he was struck. Before that I was on the end of car, where fireman could not see me.

9th Q. After turning the last switch you say you jumped on the way car; which end?

Ans. West end.

10th Q. After that did you signal to the fireman to steady up?

Ans. I did; just before they struck.

11th Q. At the time you signaled how far was the west end of car you were on from the standing cars?

Ans. Do not know exactly; think about one car length, I should think; am not sure; they were going rather fast then.

12 Q. Was that the first time you saw Mr. O'Neil?

Ans. I noticed a man up on the side of the car a little before that; thought he would get down; did not pay much attention to it.

Cross-examination:

No. 1. Did you yourself turn the switch that let you off from the main line?

Ans. Yes, sir.

2nd Q. When you turned another that let you on to No. 2?

Ans. Yes, sir.

3rd Q. What did you do after turning that switch?

Ans. I ran to the next switch ahead of the car.

4th Q. Did you turn that switch?

Ans. I did.

103 5th Q. Then what did you do?

Ans. I ran to the next ahead of the car & turned that.

6th Q. Then what?

Ans. I jumped on the end of the car and rode within a car length of the cars that were standing there; then I gave a signal to steady up; they did not do it; I jumped off and hallo*a*ed to stop, but they struck the standing cars before they stopped. Just before they struck I saw a man on the ladder, and thought he started to get down. That was after I gave signal to steady.

7th Q. Did you go in and make the coupling between the cars?

Ans. I think I did not; think the other man came from other side and made it. Do not remember; am not sure.

8th Q. Was the coupling made, either by you or the other man, when they struck?

Ans. Could not swear to that.

9th Q. Do you know whether the stationery car moved at all when they came together?

Ans. Do not know whether it moved very far or not; it might have only jarred it.

10th Q. Were the brakes set on that first stationery car?

(Objected to by pl'ff as improper cross-examination).

Ans. Do not know.

11th Q. Were they on the second?

(Objected to by pl'ff; same objection).

104 Ans. Think there was a break- set on the second; there was one on the third, I am sure. I think there were two brakes set—one on the second and one on the third.

12th Q. Did you let off the brakes that were set afterwards?

Same objection.

Ans. I let off the one on the third car myself, and I think I saw the other man let one off of the second car. There *was* four or five standing cars; think O'Neil was working on the third or fourth car. It was the fourth or fifth car.

13th Q. Were they all coupled together?

Same objection.

Ans. They were not. They never are when put in there.

14th Q. From the time you left the main line until the cars came together was there anything in the way to prevent O'Neil from seeing your engine & cars?

Same objection.

Ans. There was not.

15th Q. Do you remember whether the bell was ringing all the the time, from the time you left the main line until the cars came together?

Same objection.

Ans. It was ringing when we went over the crossing, when we went in on the side track. Do not remember whether it was ringing all time or not.

16th Q. Did you see O'Neil fall?

Ans. I did.

17th Q. Did he fall before, or after, or at the time the cars came together?

105 Ans. He fell just about the time they struck. I think he started to get down. Think he was within two or three rounds when he fell. I thought at the time th- he jumped. I did not think he was hurt.

18th Q. Did the ladder fall on him?

Ans. It did not.

19th Q. When you first saw him, how far up the ladder was he from the ground?

Ans. Think he was about 4 or 5 feet.

20th Q. Did you suppose he was in any danger at the time?

Ans. I did not.

21st Q. Did you suppose he saw the engine & car coming, & that he would get down from the ladder if he wanted to?

(Objected to by plaintiff as immaterial, & asking for a supposition from the witness & a mental conclusion.)

Ans. I did.

22nd Q. Did he see the car & engine coming?

(Objected to by pl'ff as asking for something beyond the witness' ability to know, as asking for a mental conclusion of the witness, and as asking for something which is not a fact to be testified to, but a conclusion or supposition of O'Neil's knowledge, & asking for the opinion of the witness, & he being incompetent.)

Ans. I thought he did.

23rd Q. Did you think he started to come down the ladder before the cars struck?

Ans. I think he did.

106 24th Q. Is it customary and usual for men at work in the yard, on the cars, & elsewhere, to look out themselves for danger from moving cars?

(Objected to by pl'ff as being improper cross-examination & incompetent.)

Ans. It is customary to look out for themselves. We were not in the habit of looking out for them. I don't think it was our business to look out for them.

Redirect:

No. 1. You say you think the other switchman let off the brakes on the second car. Are you certain of this, or do you merely think so?

Ans. Pretty sure he did, but am not certain. I let them off of the third myself.

2nd Q. Did you see O'Neil after he fell?

Ans. I did.

3rd Q. Where was he?

Ans. Am not sure where I saw him next. I don't remember of going over to where he laid.

4th Q. When you first saw O'Neil was the ladder inclined against the car?

Ans. It was.

5th Q. Was O'Neil working?

Ans. Do not know.

6th Q. How far upon the ladder was O'Neil when the car you were on struck the standing car?

Ans. Two or three feet. I think about two rounds of the ladder.

7th Q. Do you know of your own knowledge whether Mr. O'Neil saw the engine & car coming?

Ans. I thought at the time he did.

107 8th Q. Did O'Neil fall under the car or on the main line track?

Ans. He fell backward on the main line; he jumped backward, or at least he went backward.

9th Q. Was your recollection of this transaction better a short time after the accident or the same day after than it is now?

Ans. There might have been points in it that I remembered then better than I do now.

10th Q. Do you remember saying to John Furlong, Jr., immediately after the accident, & up at the triple switch, referring to O'Neil, "The damn fool wasn't more than half way up the ladder," or words the same & substance.

Objected to by defen't as incompetent and an attempt on part of pl'ff to discredit his own witness.

Ans. Yes; I might have said so.

11th Q. About how long was that ladder?

Ans. Should think a little higher than a car—about 12 or 14 feet; don't know whether it would reach over car or not.

12th Q. Was your recollection of this affair clearer in last May than it is now?

Ans. It was not.

Cross-examination not read to jury.

Redirect:

No. 1. Did you tell the pl'ff last May, in presence of his father, that he was thrown about 16 feet?

(Objected to by def't as leading and incompetent.)

108 Ans. I did not.

2d Q. Did you give him a statement of this affair, in which you said he was thrown?

(Objected to by defen't as leading, incompetent, and an attempt to discredit his own witness.)

Ans. I might have said something about it; he was asking me a good many questions, and I did not want to say anything [that] would discourage him.

3d. Q. In your first examination in this case, in answer to the 11th direct interrogatory, you testified: "I did not see him till after cars had struck; he was falling." Was that answer true?

Objected to by def't as incompetent & improper.

Ans. It might have been a second before or after; it was just about the time they struck.

4th Q. Was the pl'ff falling when you first saw him?

Ans. He was either falling or trying to get down himself. I think he was getting down himself.

5th Q. In your first examination in this case, in answer to the 11th direct interrogatory, you testified as follows: I did not see him till after cars had struck; he was falling. Now, explain your answer to the 17th cross-interrogatory asked you to-day.

(Objected to by def't as unintelligible & incomprehensible.)

Ans. I saw him; it might have been a second before or after; just about that time.

(Signed) FRANK S. WILDS.

109 Sworn to before me & subscribed in my presence by *me* the said Frank Wild this 11th day of October, 1878.

(Signed) ED. D. MURPHY,
Commissioner.

Dr. H. S. Farnsworth, called, and sworn, testified as follows:

By M. Foster:

Q. State your full name to the jury.
A. H. S. Farnsworth.
Q. Where do you reside?
A. At Clinton, Iowa.
Q. What is your business?
A. Physician and surgeon.
Q. How long have you practiced surgery?
A. Since 1860.
Q. Twenty years. Are you a graduate of any medical college or institution?
A. I am.
Q. What school?
A. Yes.
Q. Of what school?
A. The University of Vermont.
Q. Of what school?
A. The old school.
Q. I understand you were called to treat Mr. O'Neil, the plaintiff in this case, on the occurrence of an injury in October, 1877.
110 A. Yes, sir.
Q. Were you acquainted with Mr. O'Neil before that time?
A. Yes, sir. I had a passing acquaintance with him.
Q. Do you know what his physical condition was previous to the 18th October, 1877.
A. I always regarded him as a healthy man.
Q. Do you know of any serious illness before that time or any accident or injury of any kind?
A. No, sir.
Q. At what time in the day on the 18th October, 1877, was you called to see him?

A. I think it was some time in the forenoon. I will not state positive as to the hour.

Q. Any other physician present at that time?

A. There was. My brother was with me, F. J. Farnsworth, Doctor Myers, and Dr. Hobart.

Q. All regular physicians, physicians of the regular school, old school?

A. Yes, sir.

Q. Well, Doctor, describe to the jury the condition in which you found Mr. O'Neil on that occasion.

A. I found him with a fracture of the thigh bone, also bruises on the hip and arm, and then there were bruises on his head some.

Q. In how many places was his thigh bone broken?

A. I think in two places.

Q. Well, what was done?

111 A. I proceeded to dress it up—reduce the fracture.

Q. For what length of time did you treat him, Doctor, for that?

A. For the fracture?

Q. No, for anything growing out of this difficulty.

A. Oh, I have been treating him ever since.

Q. Well, now tell the jury under what difficulties he has labored, in your opinion as a physician, since that time, growing out of this injury?

A. He has labored under the difficulty of the hip and back.

Q. When was the trouble with the hip first discovered; was it at the time of the reduction of the fracture of the femur, or hip or thigh bone?

A. Yes, sir.

Q. Was that discovered at that time?

A. It was.

Q. What appeared to be the difficulty with the hip?

A. There was a fracture of the hip bones, and a fracture, in my opinion, of the socket that receives the thigh bone.

Q. Can that be readily ascertained as to whether there is a fracture of the socket which receives the thigh bone?

A. Not readily; no, sir.

Q. What is your opinion based upon that there is a fracture of the socket?

A. From the general appearance sometimes.

112 Q. Have you watched him carefully and examined him frequently from that time to this?

A. Yes, sir.

Q. Well, you may state whether these fractures, in your judgment and opinion, have united.

A. I think they have by this time. Yes, sir. I have the opinion they have, with the exceptions, perhaps, of the one, either on the socket of that joint or what is called the surgical neck of the bone. It might be one and it might be the other. It is hard to determine.

Q. Upon what fact do you base your opinion that it is fractured there at all?

A. In the socket or of the hip bones?

Q. Of the socket more particularly.

A. From the shortening which took place after he had recovered from the fracture of the thigh bone.

Q. Is that true that there was, after the recovery of the thigh bone, an additional shortening after that time?

A. Yes, sir.

Q. To what extent is the leg shortened at the present time?

A. Over an inch and a half.

Q. Were you present the other day at an examination by the physicians of the plaintiff?

A. Yes, sir.

Q. Did you see the measurement made on that occasion?

113 A. Yes, sir.

Q. What did the measurement indicate in regard to a shortening of the right leg?

A. Indicated that there was a shortening of it.

Q. To what extent, do you remember?

A. I think one and a half or one and three-quarters, I think, was the measurement.

Q. Well, I will ask you, Doctor, if there is a doubt existing in your mind in regard to the uniting of the fracture of the socket, why there would be more difficulty in uniting a fracture in the socket than there would, for instance, the thigh bone?

A. The bone has a very thin envelope there; it is covered with what is called white fibrous tissue, and the vitality in that is very slight.

Q. That is, you mean by vitality a slight circulation?

A. The circulation is just enough to keep life; therefore, it is very long in repairing itself.

Q. Explain to the jury why circulation is necessary to unite a fracture?

A. To keep up life. If there is no circulation there would be no life.

Q. The life is indicated by the rate of inflam-ation, is it?

A. Yes, sir.

Q. And whenever there is a uniting of construction of the tissue, repair of the tissue, inflam-ation can be observed?

A. Yes, sir.

114 Q. And, if I understand you, by reason of want of circulation, or very slight circulation, the repair would necessarily be very much more difficult?

A. Would be slower; yes.

Q. And if I—well, Doctor, taking the facts of the case as they exist, taking the length of time after the injury occurred, October 18, 1877, and there has been over two years and a half lapsed since that time, taking the condition of the plaintiff as you now find it, what would you say in regard to the difficulty under which he is now laboring being permanent or otherwise?

A. I consider it permanent, as I said in my deposition before. I see no reason to change my mind.

Q. So far as this difficulty with his — is concerned, and the difficulty with his back, have you noticed any improvement in the last twelve months?

A. I can't say that I have; no, sir.

Q. I will ask you more particularly, Doctor, in regard to the trouble with his back. What trouble do you observe with the back of the plaintiff?

A. Why, I think it is merely a spinal irritation—irritation of the spinal cord.

Q. What trouble does there seem from that?

A. An inability to use his extremities—his legs, and he complains of a great deal of pain, weakness, and extreme nervousness.

115 Q. Well, what would you say was the particular injury to the back that would produce the result?

A. I should say that it was from a shock or concussion.

Q. What affecting?

A. Affecting the spinal cord.

Q. There has been some evidence here on the part of the plaintiff in regard to the difficulty in retaining urine, constipation, &c., I will ask you what that would indicate, with reference to any nervous derangement?

A. It would indicate that the nerves were affected.

Q. Doctor, if there was an affection of the nerves of the back, or of the spinal cord, from a shock producing irritation two years and a half ago, from the condition that the plaintiff is in at the present time, what would you say in regard to that injury being tempor-y or permanent, from your knowledge as a physician?

A. We have cases on record where they recover after that length of time.

Q. Is that the rule or exception?

A. I think it is the exception.

Q. What would your opinion be in regard to Mr. O'Neil's injury at the present time as to whether the injury to the back, which contributes to an irritation of the spinal cord from the shock, being permanent or temporary?

A. I should consider that permanent.

116 Q. Do you know whether Mr. O'Neil has been able to do any kind of manual labor or dress himself from that time to this?

A. Not to my knowledge.

Q. As his physician, I will ask you whether you have found him during that time, and particularly the last year or two, as you see him now, as far as ability to move his limbs?

A. Yes, sir.

Q. Have you seen him frequently since that time?

A. Very frequently.

Q. What are your charges, Doctor, for services to Mr. O'Neill during all this period of time?

A. Four hundred dollars.

Q. Is that a reasonable charge for the services rendered by you?

A. I consider it so—yes, sir; very reasonable.

Q. That runs over the entire period from the 18th October, 1877, to the present time?

A. Yes, sir.

Q. Including surgical and medical attendance?

A. Yes, sir.

Q. Doctor, you speak of the shortening of this leg and the reduction of the fracture, I will ask you whether the proper treatment was used in the reduction of that fracture, in your judgment?

A. Yes, sir; it was.

Q. And all done that medical science was capable of doing in ordinary cases of that kind?

117 A. Yes, sir.

No cross-examination.

Additional Testimony of H. S. Farnsworth.

Q. Are you the Dr. Farnsworth who testified in this case at Des Moines on the — day of —, 187–, whose testimony was read to the jury last night?

A. I am.

Q. State whether or not the plaintiff, Mr. O'Neill, is still being treated by you for the injury he received on October 18, 1877?

A. Yes, sir; he is.

Q. Have you been his physician from that date to the present time?

A. Yes, sir.

Q. You may look at this paper and state what it is.

A. It is my bill for medical services from the time of the injury in October, 1877, to the present time.

Q. What is the amount?

A. $850.00.

Q. State what your opinion now is as a physician as to the permanency of the injury received by the plaintiff in 1877.

A. My opinion now is the same that it was then, that his injury is permanent.

Q. Have you any doubt of that in your mind as a physician?

A. No, sir.

118 State whether, in your opinion, his life will be materially shortened by reason of said injury?

A. I think it will.

No cross-examination.

Afterwards, and on the same day, the defendant, to sustain the issues on its part, offered and introduced the following testimony and evidence, to wit:

ELIAS SCHUMAKER sworn for defendant.

Q. Your name is Elias Schumaker?

A. Yes, sir.

Q. What is your age?

A. 37.

Q. What is your business?
A. A locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Since January, 1873.
Q. Are you in the employ of the C. & N. W. R'y Co.?
A. Yes, sir.
Q. How long have you been in their employ?
A. Since the fall of 1868.
Q. What did you do prior to becoming an engineer?
A. Worked on a farm.
Q. Did you fire any?
A. Yes, sir.
Q. How long?
A. From the fall of 1868 until January, 1873.
Q. What were you doing in October, 1877, at the time Mr. O'Neil was injured?

119 A. I was running a switch engine in the yard at Clinton.

Q. How long had you been running a switch engine at that time?

A. Well, between three and four years, I think I had been there then.

Q. How long have you run a switch engine since that time?

A. Up to last August. I commenced running on the road, on the Midland road, last August, and have been running there since.

Q. You were acquainted with Mr. O'Neil prior to the time of his injury, were you?

A. Yes, sir.

Q How long had you known him?

A. I could not say exactly for quite a while. I have seen him; I was not really personally well acquainted with him; I knew him by sight.

Q. Who was your fireman at the time O'Neil was injured?

A. Mr. Riggs.

Q. He is dead now, I believe?

A. Yes sir.

Q. Who was your switchman at that time?

A. Mr. Frank Welde and George Ellenwood were with me that day.

Q. What was your custom while switching in the yard with reference to obeying signals of your switchman to start and stop?

A. It was my duty to obey their signals, work by them.

120 Q. In doing switching who had charge of the direction of the work that was to be done in the yard?

A. The yard master.

Q. Who did he give his directions to in regard to what work was to be done?

A. To what they call the head switchman, the man that has charge of the engine.

Q. Who was that at this time?

A. I think it was Frank Welde that day, working in his father's place. His father was head switchman, but he was not there that day, and I think his son was working in his place.

Q. Were these orders given to you as engineer at all only as they were given to you from time to time by signals of the head switchman?

A. That was generally the only way that it was given; sometimes they told me what they were going to do.

Q. Now, what proportion of the signals that you received from the switchman while you were actively engaged at switching came from the left-hand side of you, and came through your fireman, if any.

A. Well, I should say, full as many came from that side as from my own side.

Q. How were those signals made, and how did you receive them when they were made on the fireman's side of your engine?

A. They were given to the fireman and he would speak to me.

Q. How were they given to the fireman, in what way?

121 A. By motions, or if they were close to him they might speak to him, but usually by motions with the hands.

Q. What is the signal to go ahead, for example?

A. All right, go ahead, is a signal in that way, &c. A signal to stop is an up-and-down motion.

Q. If they want to go ahead a little they used both hands?

A. Yes, sir.

Q. If they wanted to go considerable they used one hand, waiving it ahead?

A. Yes, sir.

Q. When a signal was received by motion from a switchman to the fireman, how did he communicate it to you if it was to stop?

A. Generally say, whoa.

Q. How long had this man Riggs been a fireman for you at the time O'Neil was injured?

A. I think he had been with me about six or seven months; if I remember right I think he commenced to fire for me in the spring before.

Q. Now, how frequently during the day did you receive a signal from Riggs given to him by the switchman on his side? Could you give approximate number of the signals that you would get in that way during a day?

A. No, sir. I could not.

Q. Were they a good many, or only a small number?

122 A. A good many; just as liable to get them from that side as my own.

Q. What other method did Riggs have of telling you to stop besides anything whoa?

A. I don't know as he would have any, without he would signal himself with his hand if I happened to be looking at him, but that was the word we always used to stop, *was* whoa.

Q. Do you remember which way your engine was headed at the time O'Neil was injured?

A. It was headed west.

Q. That would bring you on the north side of your engine?

A. Yes, sir.

Q. And the fireman on the south side?

A. Yes, sir.

Q. Now, O'Neil, I believe, was standing on the south side of the way car at the time he fell and was hurt?

A. I suppose he was; I didn't see him; I saw him afterwards.

Q. Now, what were you doing just previous to the time that he was hurt?

A. Well, I don't remember just what we had been doing; I know we were going in on the cut-off with a way car ahead of us at that time, but I do not remember where we had got it, and I think we had got it over on the south side of the main line.

Q. Do you remember whether or not you came onto No. 2 track from the main line?

A. Yes, sir; we came on from the main line onto the cut-off.

123 Q. This cut-off was a track which ran from the main line across the way-car track and onto the number 3 track north of the way-car track?

A. Yes, sir.

Q. Now, this way-car track, Mr. Schumaker, was the first track north of the main line, as I understand it?

A. Yes, sir.

Q. What was that track used for?

A. It was used for the purpose of keeping cars on.

Q. Was there any other use to which it was put at that time, or was it used exclusively for that?

A. It was used exclusively for way cars.

Q. Do you remember about how many trains a day were coming in and going out at Clinton at that time of all kinds?

A. There must have been 25 or 30, I should judge. There was quite a good many trains coming in there at that time of the year.

Q. How many switch engines were at work during the daytime at that time?

A. I think there were two at that time.

Q. How many were at work there at night?

A. 3.

Q. When the way car came in on a train from the West what was done with it?

A. They would take the way car off and put it in on this way-car track.

Q. And if one came from the East what was done with that?

A. Take that off and put it in on the way-car track.

124 Q. If a train was made up to go east or west how would they get a way car?

A. Switch one out from that way-car track and put it on the train.

Q. How did those cars come—first in and first out, or otherwise?

A. First in and first out. That is, on the Iowa division. I think on the east side there was quite a good many regular runs. I think those men had regular runs and regular way cars right along every day.

Q. When you wanted to get a way car out was it usual for you to be obliged to take out several to get the one you wanted?

A. Yes, sir.

Q. And then put the balance back again after you had got that out?

A. Yes, sir.

Q. How was it when you put those cars in on the track about coupling them together?

A. They usually coupled them together as they were put in there.

Q. Do you remember who turned the switch that day to let you off the main line onto the cut-off?

A. No, sir; I do not.

Q. How fast were you going when you went in from the main line on to the cut-off?

A. I should judge I was going 4 or 5 miles an hour.

Q. About how far is it from where you go in on the cut-off, off the main line, to the standing cars, on one of which O'Neil was
125 at work—about how far?

A. It must have been as much as 6 car lengths.

Q. A car length—about 30 feet?

A. Yes, sir.

Q. Now, before you came to the cutoff in getting in onto the switch, what were you doing at that time; that is to say, whether when you were going onto a switch, what was your duty, looking out to see whether the switch is all right?

A. I always look at the track to see if the switches are all right.

Q. When you have got to run over switches, is it the universal custom to keep your eye out on those switches to see if they are all right before you go onto them with your engine?

A. Yes, sir.

Q. Do you remember of seeing O'Neil or anybody on the side of the way car that day when you went in off the main line?

A. No, sir; I did not.

Q. Do you know whether you looked up that way or not; and, if not, why not?

A. I don't remember of looking up. I do not think I could have seen him if I had looked up, because I had this way car in front of me. I might when I was on the main line if I had looked, but I do not remember of looking. I do not think I did.

Q. After you went in on the cut-off, from that time up to the time when your car went up to the cars standing on the track, could you see him?

126 A. No, sir; I could not.

Q. Did you have any knowledge at that time that he was there in any way?

A. No, sir.

Q. Do you remember where you were with your engine when you shut off steam—when you shut off your throttle-valve after you went off the main line.

A. I think I shut off on the last switch, the switch that turned from the cut-off onto the way-car track, or this No. 2 track. I slacked up there for that.

Q. Either Ellenwood, I suppose, or Wilde turned these switches, and you do not know which?

A. I don't remember which.

Q. You think you shut off steam about when you went over the last switch?

A. Yes, sir.

Q. About how far would that be from your engine where you shut off steam to the first cars west standing on the way-car track.

A. I think it would be about two car lengths.

Q. Now, when you shut off steam, was there any steam left to use after that?

A. Yes, sir; steam that is in the cylinders and in the drive-pipes from the throttle-valve down.

Q. How large is that pipe from the throttle-valve down to the cylinder?

A. About six-inch pipe.

Q. Is it cut in two for branching off to each cylinder?

A. Yes, sir.

127 Q. Is the throttle-valve located in the steam-dome?

A. It was in the back dome of that engine.

Q. And it is several feet, 8 or 10, to the cylinder?

A. Be about 12 or 15 feet.

Q. So there would be what steam there is in that six-inch pipe after you shut the throttle off?

A. Yes, sir.

Q. Now, about what rate of speed do you think you were moving at the time you passed over the last switch onto No. 2 track?

A. Well, after slacking up there and throwing my engine ahead, I started up again. I might possibly have been going about 4 or 5 miles an hour when the engine crossed the switch.

Q. You had slacked up previous to that and started up again?

A. Yes, sir.

Q. Was that with what steam you had?

A. I might have opened the throttle a little then; I don't remember distinctly.

Q. Did you get any signal from Riggs after you crossed the last switch onto this No. 2 track?

A. Yes, sir.

Q. What signal did you get?

A. He said "whoa."

Q. Now, when you got that signal, how far was the end of the way car you had coupled to your engine—the west end of the way car you had coupled to your engine—from the east end of the first standing car on the way-car track?

128 A. I should judge it was about a car length.

Q. When he said "whoa," did he have his head out of the window, just previous to that, looking?

A. Yes, sir.

Q. Did he put his head in and say whoa?

A. Yes, sir.

Q. Did he say that different from what he always said whoa; and if so, what difference?

A. He might have spoken possibly a little shorter or sharper; he just said "whoa," and it might not have been much different tone from what he always said it.

Q. Would he indicate by that how quick he wanted you to stop?

A. Yes, sir; if he wanted me to stop quick he would speak "whoa" short.

Q. And if he wanted you to stop slow he — draw it out?

A. Say it slow.

Q. From the way he said whoa that day, did you apprehend danger or anything?

A. No, sir. I knew he wanted to stop; did not know what it was for.

Q. When you get a signal to whoa or go ahead, do you ask what it is for, ever?

A. No, sir.

Q. Have you any other duty there than to obey the signals of these switchmen?

A. No, sir.

Q. Whether it is to come ahead or stop?

A. I am there to do the work with the engine, whatever they want to do.

129 Q. When he said whoa, what did you do?

A. I reversed my engine.

Q. Into the back motion?

A. Yes, sir.

Q. Did you stop?

A. Stopped. Signal to go ahead.

Q. How far do you think you moved after he said whoa before you got a signal to come ahead?

A. I should say perhaps ~~one or two~~ car lengths; I got almost stopped when I got a signal to come ahead again.

Q. If you had received no signal to come ahead, do you know whether or not you would have stopped before you hit the other car?

A. No, sir; I would not have hit the other car.

Q. Who did you receive the signal to come ahead from after you had got about two-thirds of a car length?

A. From Mr. Ellenwood.

Q. Where was Ellenwood at that time?

A. He was on my side, somewhere along the car; I don't remember now just where, but he was there somewhere.

Q. How did he give you the signal?

A. With his hands.

Q. What did he indicate to you, to come ahead a little or much?

A. Come ahead a little; and I think he hollered to come ahead a little at the same time.

Q. When he said that what did you do?

130 A. I let the lever go ahead again—throwed it in the forward motion.

Q. Did that give it an imp-tus forward again?

A. Yes, sir.

Q. As soon as he said go ahead, was your hand on the lever when he said that?

A. Yes, sir.

Q. And when he made the motion?

A. Yes, sir.

Q. How long did it take you put on the forward motion again?

A. Not but a second, and I did not leave it there; I just let it go until the steam started it ahead and then took it back.

Q. Why did you do that?

A. Because I knew I was not far from those cars that stood there.

Q. Do you know whether you struck the car or not; and, if so, with how much force?

A. Well, I think I might have struck the car, but I do not think I moved the car at all; I did not strike it with enough force so I felt it on my engine any.

Q. Now, when you got the signal of Ellenwood to come ahead, what did Riggs say, if anything?

A. He didn't say anything to me at all after I had got stopped.

Q. How soon after you got stopped did he say anything, and what did he say as soon as he got stopped?

A. He told me there was a man on that side on a ladder, and that he had fallen.

131 Q. How long time elapsed from the time Ellenwood said go ahead before you had thrown your lever into the forward motion and got up to the car and struck it and Riggs began to tell you this?

A. It was only three or four seconds; it was very little time.

Q. Now, after you had received the signal from Ellenwood and thrown your engine into the forward motion by a single movement of your hand, was there time after that for Riggs to have told you and you stopped the engine the second time before you hit the car?

A. No, sir; there was not.

Q. What kind of a day was it that day; do you remember?

A. It was a pleasant day.

Q. Was there any wind to any extent?

A. No, sir; I do not think there was.

Q. Do you know whether there was any engine except your engine in that vicinity at that time?

A. I do not think there was any up there at that time; it was just the time of day we were not very busy.

Q. What time of day was it?

A. About 10 o'clock of the forenoon.

Q. Now, do you know whether the bell was ringing while you were going over those switches?

A. Yes, sir; it was.

Q. Who was ringing it?

A. Mr. Riggs, the fireman.

132 Q. Do you remember whether it was ringing all the way from the time you left the main track?

A. Yes, sir; it was.

Q. Did you notice whether or not Riggs had his head out of the window while you were going along the cut-off onto the No. 2 track?

A. Yes, sir; I noticed him; I remember seeing him once or twice have his head out.

Q. How was he ringing the bill?

A. Ringing it — one hand; he sat there where he could lean out of the window and ring the bell with his right hand.

Q. When he said whoa! did you know or have any idea why he said it?

A. No, sir.

Q. When you receive a signal of that kind do you ever ask why they give it afterwards or at the time?

A. No, sir.

Q. Was that a heavy engine or a light engine?

A. It was a pretty heavy engine; switch engine.

Q. How were the switches there from the main line onto the cut-off and from the cut-off onto No. 2 track; were they in first-rate order?

A. No; they were a little worn there; they most always are there, they do so much work over those switches.

Q. How many times a day do you think a switch engine has to go in there onto the way-car track during the 24 hours at that time, when the business was brisk, to put in and take out way cars?

133 A. It might go in on that end perhaps 20 times a day.

Q. Do you mean in the 24 hours or during the day?

A. During the day.

Q. You were not on at night?

A. No, sir.

Q. Can you give the jury an idea of how much noise your engine at that time would make going through those switches, and how far a person could hear them, if they were listening?

A. It seems to me they ought to hear it a block away; they made considerable noise, especially when the switches are worn any.

Q. How were these switches as to being covered with oil, so as to quiet the noise?

A. They never cover switches with oil.

Q. Were they oiled?

A. They sometimes pour a little oil under the rails, so the switch will turn easy, but it does not deaden the sound of the switch.

Q. What kind of a bell was it on that engine?

A. Ordinary engine bell.

Q. About how far, on such a day, could that bell be heard?

A. Well, by persons in good hearing, it would be heard two or three blocks away, I should judge.

Q. Now, Mr. Schumaker, give the jury an idea of how much time elapsed from the time Riggs said whoa until you had gone

134 forward, received the signal from Ellenwood, and the cars had come together?

A. It might have been five seconds; not much more than that.

Q. How fast do you think you were going when you got his signal when he said whoa?

A. I think I might have been going at that time five miles an hour.

Q. What means have you got to stop those switch engines quicker than other engines?

A. Their packing is set in tighter, and they are fixed on purpose to stop in that way quick by reversing the engine, and they are smaller drivers, and the ports are covered quicker—I mean the steam ports—by having smaller drivers; they take steam quicker than engines with larger drivers.

Cross-examination:

Q. Four miles an hour, that would be not faster than a man would ordinarily walk?

A. No, sir.

Q. Your engine is what they call a pony?

A. Yes, sir.

Q. It has none of the small trucks that road engines have?

A. No, sir.

Q. It has simply four drivers, two on each side?

A. The right rests upon the drivers.

Q. And for that reason, and the manner in which it is packed, and the small drivers, it is capable of being stopped and started very quickly?

A. Yes, sir.

Q. With your hand on the lever, at 4 miles an hour, what distance can you stop it by reversing?

135 A. I should say if you were going 4 or 5 miles an hour, and having a car ahead of the engine, you would stop in two-thirds of a car length—20 ft.

Q. Couldn't you stop quicker than that?

A. If you opened the throttle you might stop quicker than that. I said I had stopped, or nearly so, and started up again.

Q. Well, now, in starting up again you are not sure that you opened the steam at all, or that you turned in any steam?

A. I am inclined to think *it* did.

Q. At the time that Mr. Riggs gave you this order did you have your hand on the lever?

A. Yes, sir.

Q. That is the custom of engineers when they are handling an engine, to have the lever in their hand?

A. Yes, sir.

Q. So when he said whoa the reversing of the engine was almost instantaneous?

A. Yes, sir.

Q. Do you think that would take 2-thirds of a car length?

A. It would if we had a way car ahead of the engine.

Q. Then it would take that much longer to start?

A. Certainly it does.

Q. Now, if Riggs had said to you whoa, there is a car repairer in the way here, there would have been no occasion of any danger, would there?

136 Objected to as asking his judgment on a case that does not exist here, hypothetical, and argumentative. (Sustained.)

Q. Now, you say that when you went over the switch you were two car lengths from the striking point, as I understand it?

A. Yes, sir.

Q. You did not run very rapidly after getting to that stop?

A. I started up again, and might have been going 4 or 5 miles an hour.

Q. How long does it take you to get up a motion of 4 or 5 miles an hour?

A. Possibly run a car length before you get to going that if you were stopped, or nearly so.

Q. That is about the ordinary jog you move your engine in the yard. Now, you received this signal from Riggs, you testified before in this case, I believe?

A. Yes, sir.

Q. I will ask you whether, in your testimony on the last trial in this case, you did not say that the order came sharp and quick, unusually loud?

A. I won't say that it did not. I say he spoke rather sharp to me to stop. He spoke whoa rather sharp.

Q. And you understood that to mean to stop, and from the manner in which he spoke you understood to stop immediately?

A. I understood it meant stop; yes, sir.

Q. You say there was probably 5 or 6 seconds from the time he spoke before you finally struck the car?

A. I should judge that.

137 Q. Now, did he say anything to you about why he had told you to stop?

A. He did not until after we were stopped.

Q. He then didn't say whoa, there is a man on a ladder here?

A. No, sir.

Q. Is it a part of your duty and that of the fireman to look out for persons in danger, and avoid it in operation of an engine?

A. Yes, sir.

Q. Now, suppose, Mr. Shumaker, that you at the time you were running in on where there are car repairers at work you had knowledge of their presence, would you obey a signal of the switchman to come forward to make a coupling; in other words, must you obey a switchman's instructions at the peril of any man's life?

Objected to.

Q. I ask whether you are obliged to obey a signal of the switchman that orders you to go forward where you would imperil life by going?

A. I would not obey it, of course, if I knew some one's life was in danger.

Q. I understand you that it is your duty to avoid collision with any human being that is on the track.

A. We do not aim to hurt anybody.

Q. You aim not to do it?

A. Certainly, we try to avoid it as much as possible.

138 Q. Now, Mr. Schumaker, you knew that when Riggs said whoa in this loud and short manner you knew that that did not refer to the fact that you had come near enough to make the coupling?

A. I didn't know what it was.

Q. I understand you don't know what it was, but didn't you say on the last trial that you knew it did not mean you were near enough to make the coupling, because you could see as well as he how near you were to the cars?

A. I admit that.

Q. You were looking out to make the coupling?

A. Yes, sir.

Q. It is your business to retard the progress of the engine when you get close to where a coupling is made?

A. Certainly.

Q. And you risk your own judgment as to when it is time to reverse the lever?

A. I do unless I am working by signal.

Q. When Riggs called out whoa you knew it did not refer to the distance from the coupling point. You knew, in other words, he did not mean to say whoa, it is time to stop to make that coupling; you know he did not mean that; did you ask him what he meant?

A. No, sir.

Q. When you reversed the lever and stopped did you ask him the cause of this?

A. No, sir; I never ask such a question as that.

Q. Did he ever tell you or give you a reason for it?

139 A. Not until after I had stopped.

Q. Not until after the injury was done?

A. I did not know but the switchman wanted to get a link or a pin to make the coupling with. I didn't know what it was.

Q. You did not know what it was, and never inquired, and he did not tell you?

A. No, sir.

Q. Now, you say, Mr. Schumaker, that a man can hear the bell ring or the switches click for some little distance if he is listening?

A. Yes, sir.

Q. You take a man standing on the side of a car and banging away at screws by his ear, that might possibly drown the sound of a switch engine crossing the switch, might it not?

A. It ought not to, because a man in a perilous position of that kind ought to be more careful than if he was down on the ground.

Q. Yes, and I suppose a man on his engine ought to be more careful than one running a wheelbarrow. I ask you if a man standing pounding near his ear on heavy screws might not have his ear attracted by his own noise rather that this of the engine?

A. Well, he might.

Q. You regard it, do you not, as your duty to stop always when you are approaching a car upon which a man is engaged in working if he does not see your approach?

A. Yes, sir.

140 Q. There is no rule in your company which permits you to run into cars under which and upon which and about which men are working?

A. No, sir; we do not aim to hurt anybody.

Q. Now, you say that Mr. Riggs had his head out of the cab window and appeared to be looking down that way for some time before you came up to this point?

A. Yes, sir: I had noticed him once or twice looking out.

Q. As though he was watching something?

A. No more than he always does; it is his business to watch out for signals and be looking, as well as me.

Q. Is it as much the fireman's duty, if he sees a man on the side of a car in danger, to cause the engine to stop as it is your-, if it happens on his side of the car?

A. I don't know but it is.

Q. Then you wish the jury to understand you as saying when the fireman sees a man in danger it is as much his duty to prevent it as it is yours, although you handle the lever?

A. Yes, sir.

Q. You are familiar with the lay of the ground there and the tracks?

A. Yes, sir.

Q. The tracks were straight?

A. The main-line tracks were straight.

141 Q. Was there anything to prevent Mr. Riggs? This is supposed to represent the engine and the tender; your position would be on the right side or this side, would it not?

A. Yes, sir.

Q. Riggs on this side?

A. Yes, sir.

Q. As you ran west Riggs would see anything upon the south side and you would see anything on the north side from the outlook here in the cab window?

A. Yes, sir.

Q. Q. Was there an-thing in running two hundred feet to prevent him from seeing O'Neil upon the ladder?

A. No, sir.

Q. Was there any conversation or any work going on between you and him that would prevent his telling you of O'Neill's danger that he saw?

A. No, sir; there was *not* conversation took place between him and me.

Q. Do you know whether he was replenishing the furnace at that time?

A. I don't think he was.

Q. Not shoveling in coal nor cleaning any lamps?

A. No, sir.

Q. Not engaged in any kind of work of the fireman at all, but simply looking to avoid danger?

A. No, sir.

Q. The wind was not blowing or storming in any way so as to prevent conversation?

142 A. No, sir.

Q. There was no reason to prevent his telling you why?

A. He could have told anything he wanted to that I know of.

Q. And you could have heard or understood anything that he would have told you?

A. Yes, sir.

Redirect examination:

143 Q. Now suppose Mr. Wilde, being on the fireman's side, had wanted a link to make the coupling with, and he gave a very quick motion to stop like that to Riggs, how would Riggs give the signal to you—quick, sharp, or slow?

A. Sharp and quick.

Q. And that would mean that he wanted you to stop before you got to the car for some purpose?

A. Yes, sir.

Q. Now if you saw a man on the side of a car from your side of the engine three or four hundred feet away, would you stop your engine and send somebody ahead to order him down?

A. No, sir.

Q. Would you have a right to expect, under the customs of the yard there, that he would get down if you went forward moderately ringing the bell?

A. I should expect him to get down.

Q. And let you do your work first?

A. Yes, sir.

Q. And then he could go up and do his afterwards?

A. Yes, sir.

Q. Well, if you were ringing the bell, how near would you get to him with your car before you would stop?

A. Well, I would go up just near enough so I could be sure I could stop and not hit him.

Q. At the rate you were going did Riggs say whoa in time

144 for you to stop before you got to the car?

A. Yes, sir.

Q. And you would have stopped only for this other signal from Ellenwood?

A. Yes, sir.

Re-cross examination:

Q. Now, Mr. Schumaker, you say you would expect a man to get down if you were ringing the bell; you would expect him to hear it and receive warning and avoid accident?

A. Yes, sir.

Q. And you say if he did not avoid it it would be your place to?
A. Yes, sir.
Q. And you would take every means to prevent it?
A. Yes, sir.
Q. And you say if he did not avoid it it would be your place to?
A. Yes, sir.
Q. It matters not whether you were the fireman or engineer you would endeavor to do that?
A. Yes, sir.

G. B. ELLENWOOD sworn for defendant.

Q. Where do you reside?
A. Clinton.
Q. What is your age?
A. 27.
145 Q. What business are you engaged in?
A. Am now clerk in the freight office of the Northwestern.
Q. How long have you been in the employ of the Northwestern?
A. About nine years, I think.
Q. What were you doing in 1877, in October?
A. I was switchman then.
Q. Were you head switchman?
A. No, sir.
Q. The assistant?
A. Yes, sir.
Q. Who was the head switchman?
A. Ira Wilde.
Q. Who was acting as head switchman the day that O'Neil was injured?
A. Frank Wilde that day, I believe, a son of Ira.
Q. Who gave the directions as to what work was to be done by the switch engine in the yard there at that time?
A. The yardmaster.
Q. Who did he give them to?
A. The head switchman, usually.
Q. In doing switching, what was the custom in regard to one switchman being on one side of the engine and the other on the other; is that the proper way to work?
A. Not that I know of; the man is supposed to be wherever he can be most useful; sometimes they are on both sides.
Q. Do you remember the day that Mr. O'Neil was hurt?
A. Yes, sir.
146 Q. Pleasant day, was it?
A. My recollection is it was a nice clear day.
Q. What time of the day was it?
A. I should think about ten in the morning.
Q. Do you know whether there was any engine except your own in the immediate vicinity at the time O'Neil was hurt?
A. I could not remember positively.

Q. Do you know where Wilde was, which side of the track he was on at the time O'Neil was injured?

A. He was on the south side.

Q. Where were you about the time he received his injury?

A. On the north side.

Q. State about where it was with reference to the way car that you were taking onto that track.

A. At the time he received his injury I must have been between them when they came together; I went between them to make the coupling; I believe I did, at least.

Q. Where had you come from with that engine and way car?

A. That I could not remember; I remember being on the main line, but I do not know where we got the car; I think on the south side somewhere.

Q. Do you know who turned the switches to let you off the main line onto this cut-off?

A. I think Wilde turned those switches.

Q. All of them *of them?*

A. I think he did.

147 Q. When you were going from the main line into where you made this coupling, did you ride or go afoot?

A. I remember riding up, but I don't remember where I got on the car.

Q. Where did you get off to go on ahead and do your work?

A. I got off when we got up close enough to make the coupling.

Q. Were you on the rear or west end of the way car attached to your locomotive?

A. Yes, sir.

Q. What rate of speed, if you remember, should you judge you were going from the time you left the main line until you got in near the other way car?

A. I should think 4 or 5 miles an hour, probably.

Q. Did you give a signal to the engineer when you got pretty near the other standing cars there?

A. I did.

Q. What signal did you give him?

A. I waved my hand in that manner.

Q. What did that mean?

A. Meant for him to come ahead a little ways.

Q. Do you remember whether you said come ahead, at the same time suiting the motion to the word?

A. No. I do not.

Q. Now, about how far was the west end of the car attached to the locomotive from the east end of the first standing car on the way-car track, when you gave this signal?

148 A. It was not far, probably half a car, and maybe 6 or 8 feet. Somewhere along there. I don't know as I could remember positively about that.

Q. You state on one trial it was about a car length, I believe?

A. Yes, sir; I believe so.

Q. And the next trial you thought, perhaps, it was not so far?

A. Yes, sir.

Q. Have you any means of fixing it definitely in your memory, or do you state it to the best of your knowledge?

A. I state it to the best of my knowledge, still I do not think I would walk the length of the car if less — that distance would do; so it may possibly have been less than a car length when I got off.

Q. Why did you give the signal to come ahead?

A. So we could couple up the car and leave it in there.

Q. Did you notice whether the engine and car was going to come to a stop before it got there?

A. I could not remember about that. It may have been nearly stopped though and me not notice it.

Q. Now, had you seen O'Neil any time that day on the side of the car, on the south side?

A. No, sir.

Q. Do you know whether you had come on the north side of the cut-off all the way from the main line?

A. I don't have any recollection of being on the south side.

149 Q. And you know you were on the north side when you got off on the north side to make the coupling

A. Yes, sir.

Q. Were you standing on the west end of the west platform?

A. Yes, sir.

Q. Do you remember whether you were standing on the north side of the platform, or on the south side, or in the middle?

A. Stood on the north side.

Q. Standing on the north side, could you have seen O'Neil if he had been standing on the ladder on the south side of the third car from the east car on the way-car track?

A. I think not.

Q. Now, when you gave this signal to come ahead, did you know whether he did come ahead or not?

A. Yes, sir; I think he did.

Q. What did you do about making the coupling, if anything?

A. I stepped in and coupled the cars.

Q. How did he come up with reference to the ordinary method of coming up to make a coupling, hard or slow, or about as usual?

A. It was about as usual, not hard.

Q. Do you know whether it moved the standing cars or not?

A. I should say not much, if any.

Q. How much do you think they moved, if any?

A. I do not think they moved six inches, if they did that.

150 Q. Were you in between them there in making the coupling?

A. I was.

Q. Where was your link? Was that in the car attached to the engine or in the car that was standing?

A. I think that was in the car attached to the engine.

Q. Did you have the pin in your hand when you went in to make the coupling?

A. No.

Q. That was on the way car?

A. Yes, sir.

Q. You entered the link and put the pin in?

A. Yes, sir.

Q. How long after that before you heard that a man had been hurt?

A. I did not not know that until we got back out on the main line.

Q. What did you do then?

A. I believe we shoved all those cars down far enough to clear the switch a car length, and then cut off and backed out.

Q. After you made the coupling, did you give another signal to back up with them all?

A. I believe I did.

Q. Who gave that signal?

A. That I cannot remember; I am pretty certain we shoved the cars ahead to make them clear the cut-off.

Q. Well, did the cars come to a full stop and then start up to shove them in afterwards?

151 A. Yes, sir.

Q. Do you know whether there were any brakes set on any of those cars that were standing?

A. Yes; I think there was; most always was anyhow; must have been or it would have moved them more.

Q. Do you remember whether you let the brakes off of any of those cars immediately after you had made the coupling?

A. I do not have any recollection of doing so.

Q. Can you state whether or not the bell was ringing at the time that engine and way car was coming in from the main line up to where you made the coupling?

A. I could not state about that; was so used to hearing it that it would be impossible to remember whether it was ringing or not.

Cross-examination:

Q. Mr. Schumaker testified that after he came to a stop that you signaled him to come ahead; do you remember of doing that?

A. I do; yes, sir.

Q. You testified in Des Moines soon after this occurrence, did you not, at the trial there?

A. Testified in Des Moines; I do not remember how long it was after this occurrence.

Q. You undertook then, in your testimony, did you not, to give the distance that the car was away from the coupling at the time you signaled to come ahead?

A. I believe I did.

152 Q. You put it then at a car length in two or three different questions that were asked you on direct examination by Judge Hubbard?

A. Yes, sir; I think I did.

Q. Your best recollection differed the first time you was ever called upon to testify, so that you said that when you came to a stop,

and you signaled to come ahead, that you were a car length away?

A. Yes, sir; I testified to the best I could remember.

Q. You say that it is now the best of your recollection, then, that it was a car length?

A. Yes.

Q. You say when they came up and struck, you say the stroke did not move the car more than six inches, but they went right on and shoved them down the track?

A. I think it did not move them more than six inches when they came together.

Q. That is the one you coupled to?

A. I think there were three together.

Q. Isn't it true—suppose they were standing there—each one would have a little more slack than the other—*these* slack between cars when they stand together on the track?

A. There is a little.

Q. Now, then, if the first moved six inches wouldn't the second move a foot and the third two feet?

A. No, sir.

Q. Did you ever see an engine go onto a train and move
153 the first car a little and the caboose would move so it would pretty near break a man's neck if he was not looking out?

A. If the brakes were set it might not move at all.

Q. Won't it move further than the first car?

A. If it was strong enough to move the whole train it might.

Q. Then the further away the more the last one would go?

A. It would in case of a train, but in case of these way cars where the brake was set on the last one, likely where they were tight together, they would not move, I mean close up, whether they were coupled or not.

Q. Do you know whether they were together or not?

A. I think they were very nearly together.

Q. Will you swear they were coupled together, any two of them?

A. Certainly not.

Q. Will you swear there was a brake set on any one of them?

A. No, sir; but they are usually done so.

Q. You are swearing to custom?

A. Yes, sir.

Q. So this coming together might have moved them considerably?

A. Yes, sir; if the brakes were not set.

Q. Whether the brakes were set or not, after the coupling was made you say you shoved them all up?

A. Yes, sir.

Q. And then went out on the main track again?

A. Yes, sir.

Witness dismissed.

154 And thereupon afterwards, and on the 19th day of April, 1883, the foregoing being all the evidence and testimony offered and introduced by each and by both parties, and the evidence being fully concluded, the defendant prayed the court to in-

struct the jury to find for the defendant in accordance with the following written motion, to wit:

In the United States Circuit Court, Northern District of Iowa, Eastern Division.

JOHN M. O'NEIL
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Now, upon the conclusion of all the testimony produced on the trial of the above cause, and after argument, the defendant respectfully prays the court to instruct the jury as follows:

1. Conceding to all the testimony its greatest probative force, it is not sufficient to warrant the jury in finding the defendant or any of its servants guilty of any negligence whereby the plaintiff received his injuries.

2. The undisputed and uncontradicted evidence shows that the plaintiff was guilty of negligence which directly contributed
155 to his injury. You are therefore instructed to find for the defendant.

N. M. HUBBARD,
CHAS. A. CLARK,
For Defen't.

Which motion to so instruct the jury the court denied and refused, to which denial and refusal the defendant then and there at the time duly excepted, and thereupon, on the day last aforesaid, after the case was argued by counsel, the court, on its own motion, gave to the jury the following instructions in writing, to wit:

JOHN M. O'NEIL
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY.

In this cause plaintiff seeks to recover damages in the sum of fifteen thousand dollars against the defendant for certain injuries alleged to have been received by plaintiff on the 18th day of October, 1877, whilst in the employ of defendant at Clinton, in this State, the plaintiff averring that the injuries complained of were caused by the negligence of the servants and employees of the defendant in the management of the switch engine in use at defendant's yards at Clinton, Iowa.

156 2

On part of defendant the negligence charged by plaintiff upon defendant is denied, it being claimed that the accident did not result from any want of ordinary care on part of defendant or any of its employees.

That the accident resulted from one of the usual perils and risks inseparable from the business in which the defendant is engaged, to wit, operating a railroad, the risk and hazard of which was assumed by the plaintiff when he entered the employ of the defendant.

And defendant further pleads that even if it be true that the defendant, through its employees, was guilty of negligence in the manner claimed, that the plaintiff on his part was guilty of negligence contributing to the accident, and hence cannot recover.

3.

The first question, therefore, for you to consider is whether the plaintiff has made out the charge of negligence against the defendant.

The burden of sustaining this issue is upon plaintiff, and he must by a fair preponderance of the evidence reasonably satisfy you that the allegation of negligence thus made is true, or failing in so doing your verdict must be for defendant.

4.

Under the statute of the State of Iowa every corporation operating a railway is liable for all injuries caused to, and the conse-
157 quent damages sustained by, the employees of such corporation in consequence of the neglect of a coemployee in the performance of his duty to the company; that is to say, the negligence of an employee in the discharge of the duties of his position in the employ of the company is deemed to be the negligence of the corporation, and will render the company liable for any injuries caused thereby to any of its other employees, unless the person injured is himself guilty also of negligence contributing to the accident.

5.

In determining whether or not a railway corporation, through its employees, has or has not in a given case been guilty of negligence, the question for determination is whether ordinary care has been used; that is to say, such care as an ordinary prudent man would exercise under similar circumstances.

Railway companies are not insurers or guarantors of the absolute safety of their employees. They are not required to exercise as high a degree of care towards their employees as is exacted of them towards passengers who may be upon their trains. If the company exercises ordinary care in a given case, and yet an accident happens, causing injury to an employee, the latter cannot in such case hold the company responsible therefor.

In the manifold operations connected with the business of railroading, owing to its peculiar character, accidents may hap-
158 pen, causing injury to employees, without fault on the part of the company or its employees, and such accidents form part of the ordinary risk and hazards inseparable from the character of the business in which the companies are engaged, which ordinary risks and hazards persons entering the employ of such companies are held to have assumed themselves.

7.

If, however, the accident is caused by the negligence of the company or any of its employees other than the party injured, then the responsibility therefor is upon the company.

In other words, employees are deemed to have assumed all the risks and perils pertaining to the business of railroading when the same is conducted and managed by the company with ordinary care, but they do not assume the risks and hazards caused by the want of ordinary care on part of the company or its employees.

8.

In cases, therefore, like the one now on trial it is not enough to hold the company liable for the plaintiff to simply show that whilst engaged in the business of the company he received an injury, no matter how serious in its character. The plaintiff must show that the accident causing the injury was due to negligence on part of the company.

159

9.

As already stated to you, the negligence required to be shown to render the company liable to an employee *in* the failure to exercise ordinary care; that is to say, such care as an ordinary prudent man would exercise under similar circumstances.

What will amount to the exercise of ordinary care will vary greatly with circumstances, as under one state of facts that course of conduct which would amount to the exercise of ordinary care might, under another state of facts, fall far short thereof and be clear proof of negligence.

Therefor-, in determining this question of the exercise of ordinary care in a given case, regard must always be had to all the facts and circumstances surrounding the parties and the very time and place the accident may have happened.

When human life or safety *are* involved the law exacts a higher degree of care than is required in case where they are not put in peril. So also when a person puts himself in a position of known danger the duty is placed upon him of exercising that degree of care which the circumstances require of an ordinarily prudent man so situated.

Bearing these general principles in mind, it will be your duty to consider the evidence submitted to you and determine in the
160 first instance whether or not the charge of negligence made against the defendant is established by a fair preponderance of evidence.

10.

There is evidence in this case tending to show that the plaintiff was in the employ of defendant at Clinton, Iowa, in October, 1877; that in obedience to the orders of the foreman properly in charge of the work repairing the way cars in the yard of defendant, at Clinton, Iowa, the plaintiff, on the 18th of October, 1877, undertook the work of replacing certain lamp-brackets on a way car of defendant,

then standing on a track in defendant's yard designated as track No. 2; that plaintiff went to the place where the way car was stationed for the purpose of performing the work he was directed to do; that before going upon the side of the car he noticed the position of the switches, by the use of which engines or cars could be run in from the east upon the track where the way car was stationed which he was to repair, and that these switches, or some of them, *was* so turned as that an engine or car could not be sent in upon track No. 2 from the east without a change in the position of the switch or switches.

That the way car which plaintiff was to repair was the third
161 car from the east, there being two other cars to the east of it, and therefore between it and the switch connecting with this track No. 2; that plaintiff, in order to reach the place upon the way car where the brackets were to be replaced, was obliged to use a ladder, which was inclined against the side of the car.

11.

That whilst plaintiff was on this ladder engaged in the performance of the work he was required to do upon the way car a switch engine belonging to defendant with a way car in front of it came from the main track in upon track No. 2.

That upon the switch engine there was a fireman and engineer who were at their posts, and that there were also two switchmen to aid in getting the engine & car in upon track No. 2 and in making the coupling needed to be made.

That the engine & car came in upon track No. 2 and came westward along the same towards the place where plaintiff was at work, the object being to couple onto the way car, which was the second one east of the car upon which plaintiff was at work.

12.

That as the engine came along track No. 2 for the purpose named the fireman saw O'Neil at work upon the car, and when the
162 engine had nearly reached the stationery way cars, seeing that O'Neil did not get down from the ladder, the fireman signalled the engineer to stop by crying out "whoa."

That in obedience to this signal the engineer shut off steam and reversed the engine, and either wholly or nearly stopped the engine.

That then receiving a signal from the switchman, who was on the north side of the track, to move forward he gave the engine a forward motion sufficient to bring the way car attached to the engine in contact with the stationery cars, and in consequence thereof the ladder upon which plaintiff was standing was overthrown, plaintiff being thrown upon the ground and receiving the injuries complained of.

13.

The first question for your consideration and determination is whether this accident resulted from the lack of ordinary care on the part of any of defendant's employees in charge of said engine, to

wit, the switchmen, fireman, and engineer. There is no evidence tending to show that the switchmen on the north side of the track saw or could see plaintiff at the time of the accident, or had knowledge of his dangerous position, so that there is no claim made that he was negligent in the premises.

14.

163 It is claimed on part of the plaintiff that the switchman on the south side saw O'Neil's danger in time sufficient to have averted the danger.

On part of defendant it is claimed that this switchman did not see O'Neil in time, and under such circumstances as that it was his duty to either have stopped the engine or warned the plaintiff of the danger. Has the plaintiff, by a fair preponderance of evidence, satisfied you that this switchman had knowledge of plaintiff's danger in time sufficient to have averted the accident, either by stopping the engine through a warning to the engineer, or by notifying plaintiff of the coming danger, so that he could have avoided the accident?

It is not sufficient for it to now appear that possibly the switchman might have done so if he had then known all the facts that are now made apparent. The true inquiry is, Was this switchman, acting under the light and knowledge he then had, wanting in the exersise of ordinary care in not stopping the engine, or in not notifying plaintiff of his danger? Did he or not have knowledge of the danger to which pl'ff was exposed in time sufficient to enable him by the use of ordinary care to have caused the engine to be stopped or to warn the pl'ff, so that he might have gotten down from the ladder before the cars came in contact?

164 15.

It is further claimed on behalf of plaintiff that the fireman, Riggs, was negligent in not notifying the engineer of the peril to which plaintiff was exposed. There is evidence tending to show that Riggs saw the plaintiff upon the ladder and knew of his position, and that there was danger of an injury being caused to him if he did not get down before the cars came in contact; that Riggs gave a signal to the engineer to stop in time to prevent the cars coming into contact, which signal the engineer obeyed by shutting off the steam and reversing the engine.

On part of plaintiff it is claimed that Riggs should have notified the engineer of the necessity for stopping the engine, namely, that there was a man in a dangerous position; and it is claimed that Riggs had time sufficient to have so done, so that the engineer could have prevented the cars coming in contact.

On the part of defendant it is claimed that Riggs did all that could reasonably be expected of him; that he gave the proper signal to stop the engine, and that in obedience thereto the engineer reversed his engine and brought it nearly to a stop, and then,
165 before Riggs had time to ascertain the necessity for any further action on his part, the engineer, in obedience to a signal

from the switchman, which could not have been reasonably foreseen by Riggs, gave a forward motion to the engineer, and that it was beyond the power of Riggs to again notify the engineer to stop in time to prevent the accident.

16.

It was the duty of Riggs, if he saw that pl'ff was in a dangerous position, and that there was risk of an accident if the cars were brought into contact before plaintiff should get down from the ladder to take such action as was reasonably within his power to stop the engine and prevent the cars from coming into contact.

When human life or limbs are in peril ordinary prudence requires that all reasonable means should be used by those who are aware of the danger to avert the same and avoid injury to the person exposed thereto.

Riggs himself testifies that he saw pl'ff upon the ladder, knew that he was in a dangerous position if the cars were brought into contact, and saw, as the engine approached the standing cars, that the plaintiff remained upon the ladder.

Under these circumstances, was or was it not his duty to notify the engineer, who had the control of the engine, of the nature
166 of the danger to be avoided, or was his duty discharged when he gave the signal to stop by crying out "Whoa?"

Did he or did he not have sufficient time to give such information to the engineer, if you find the same should have been given?

It is for you to determine what ordinary prudence, when human life and limb were in danger, required of Riggs under the facts & circumstances known to him at that time, and whether Riggs did or did not do all that ordinary prudence required of him, and all that he had a fair opportunity to do, in the exercise of ordinary care, in the brief time in which he was required to think and act.

17.

It is further claimed on part of plaintiff that the engineer did not exercise ordinary care and prudence on his part, in that, after receiving the signal to stop from the fireman, and after, in obedience thereto, reversing his engine & bringing the same nearly to a stop, he then, in obedience to a signal from the switchman on the north side of the track, gave a forward motion to the engine and brought the cars into contact, without first ascertaining the reason why the signal to stop was given by the fireman.

On part of defendant it is claimed that the switchman & fireman have a right to signal the engineer, & that it is the duty
167–8 of the latter to obey such signals, and if the switchman gave the signal, without fault on his part, there would not be negligence on part of an engineer in obeying the signal thus given.

18.

That the engineer is bound to obey signals given by the switchmen is doubtless true as a general proposition, but by this can only

be meant that the engineer is bound to obey if there is no good reason why he should not obey.

Suppose he received a signal from a switchman to move forward when he sees that if he does he will cause an accident, would it not then be clearly his duty to disobey the signal? Suppose at the instant he receives a signal from the switchman to move forward his fireman notifies him that there is a man on the track in danger, and that he must stop. It cannot be doubted that in such cases the engineer must disobey the signal from the switchman.

Take it in this case. Suppose the engineer knew that the plaintiff was on the ladder, exposed to danger, if the cars were brought into contact, & the switchman gave the signal to move forward, would it be acting with reasonable prudence to obey the signal, or would it not be clearly the duty of the engineer to disobey the same?

But it is in evidence that the engineer in this case did not know in fact that plaintiff was in danger. He had received a signal from his fireman, on the left of his engine, requiring him to stop, and he obeyed it by shutting off steam and reversing his engine.

169 What inference did the engineer draw from the signal given him by the fireman to stop? Did he or did he not infer therefrom that there was some sufficient reason known to the fireman why the engine should be stopped? Was he not bound to so infer, and if he did what was it his duty to do when he received the signal from the switchman, on the other side of the track, to move forward? Did or did not ordinary care and prudence require of him to ascertain from his fireman the reason of the order to stop given the fireman, on his left, before he obeyed the order to move forward given him by the switchman on his right?

The engineer himself testifies that the signal "whoa" given by the fireman was given somewhat sharply, indicating the necessity for promptly stopping the engine; and he further testifies that from the distance from the engine to the stationery cars he supposed the order to stop was given by the fireman, not because the cars were close enough for coupling, but for some other cause or reason unknown to him, and that he started the engine forward upon receiving the signal from the switchman without making any enquiry of the fireman whether he could safely do so, or without enquiring why the fireman had ordered him to stop the engine.

In so doing did or did not the engineer exercise the care which ordinary prudence demanded of him?

19.

170 If, under the instructions given you, you find that none of the employees of the company were guilty of negligence causing the accident, then your verdict must be for defendant, and you need not consider any other of the questions submitted to you.

If, however, you find that the defendant was negligent in any of the particulars alleged against it, and that such negligence was the

immediate cause of the injury to plaintiff, you will then consider whether the defense of contributory negligence set up by the defendants has been made out and sustained by a fair preponderance of the evidence, the burden of the issue in this respect being upon the defendant; or, in other words, in order to defeat plaintiff's recovery on the ground of contributory negligence on his part, you must be fully satisfied from the evidence that plaintiff was guilty of negligence which proximately contributed to the injury complained of.

20.

It was the duty of the plaintiff, when he was engaged in the work at which he was put by the defendant, to exercise ordinary care on his part to protect himself from danger.

He knew when he undertook the repairs on the car in question that it stood upon a track where engines might possibly come, and he was bound to the exercise of all the care and watchfulness which an ordinarily prudent man would use under the same circumstances.

171

21.

Extraordinary care was not required of him. He was expected to do the work that he was sent to attend to, and he could only be required to exercise the care and watchfulness that were compatible with the discharge of his duty to the company.

Plaintiff testifies that he did not see or hear the engine when it was approaching, and it is claimed that his failure to notice its approach is proof of his negligence, on the theory that if he had kept his senses on the alert he would either have seen or heard the engine in time to have avoided the accident.

On part of plaintiff it is claimed that his failure to notice the approach of the engine was due to the fact that the work he was engaged in doing so occupied his attention that without fault upon his part he failed to notice the coming of the engine either by sight or sound.

You will consider all the evidence introduced in the case tending to show what work the plaintiff was required to do—the position he occupied upon the side of the car, the direction in which his face was turned whilst at work upon the ladder, the character of the work upon which he was actually engaged, and the demands, if any, which this work made upon his attention, the distance from where the plaintiff was at work to the point where the engine came upon track No. 2, the number of cars, if any, between that upon which plaintiff was at work and the approaching engine, and all facts shown by the evidence adduced by either party which tend to throw light upon the question—and from this evidence you will determine whether the defence of contributory negligence, as alleged by the defen't, has been established by a fair preponderance of evidence, the burden of establishing the same being, as already stated, upon the defendant.

172

22.

If the evidence under the instructions given you fails to establish the fact that the plaintiff was wanting in the exercise of proper care and watchfulness whilst engaged in repairing the way car of defen't, then the defence of contributory negligence is not made out, and on this issue you should then find for plaintiff; but, on the other hand, if you find that the failure of plaintiff to notice the approach of the engine was due to a want of ordinary care & watchfulness on part of plaintiff, you will then consider and determine whether the defen't had knowledge of the dangerous position of plaintiff and of his failure to notice the approach of the engine in time to have avoided the injury to plaintiff
173 by the exercise of reasonable care on its part, the rule of law being that, although the pl'ff may have negligently exposed himself to an injury, yet if the def't, after discovering the exposed situation and danger negligently incurred by the plaintiff, can, by the exercise of reasonable care on its part, prevent any injury to plaintiff, it is bound so to do, and a failure to exercise such reasonable care after knowledge of the danger to which pl'ff may be exposed, will render the def't liable for a resulting injury, notwithstanding the fact that pl'ff may have been in the first instance negligent on his part.

Under such circumstances plaintiff's negligence is not deemed to be a proximate cause of the injury.

If, then, you find from the evidence that the plaintiff, through his failure to notice the approach of the engine in time to get down from his exposed situation on the side of the way car, was guilty of negligence contributing to the causing of the injury complained of, then your verdict must be for the defendant, unless you further find that, after discovering the fact that plaintiff was at work upon the way car in such a manner as to expose him to danger in case the cars were brought into contact, the def't could, by the exercise of proper care, have prevented the accident, and that having knowledge of the danger to which plaintiff was exposed the defen't
174 failed to exercise proper care, thereby causing the accident, in which case your verdict should be for the plaintiff.

That is to say, if you find from the evidence that the switchman Wilde and the fireman Riggs, or either of them, saw the plaintiff in his exposed position, and knew the danger to which he would be exposed if the cars were brought into contact whilst the plaintiff was on the ladder, then it was the duty of such switchman or fireman, as already explained to you, to take such reasonable means as were fairly within his power to prevent bringing the cars into contact, after he knew that plaintiff had failed to notice the approach of the engine.

If, by the use of such means on part of those in charge of the engine, the accident could have been prevented, and you find that they have failed to use such means, after having knowledge of the plaintiff's exposed position and failure to notice the approach of the engine, and that in consequence of such failure the accident was caused,

then the fact that the plaintiff failed to notice the approach of the engine would not defeat his right of recovery.

If under the instructions given you you find for the def't you will say so by your verdict.

23.

If you find for the plaintiff, then you will determine the
175 amount of damages to which pl'ff is entitled by reason of the injuries received by him; and in considering the question you will consider—

1st.

The actual and necessary expenses incurred by plaintiff in procuring medical and surgical aid and nursing required by him in consequence of the injuries he received.

2nd.

Compensation for the loss of time, if any, caused to plaintiff by the injuries received.

3rd.

For the pain and suffering caused to plaintiff by the injuries he received.

4th.

If you find from the evidence that the injuries he received have affected plaintiff's health and strength and notable length of his life, and also if you find that pl'ff's injuries, or any of them, are permanent or are likely to continue for some time in the future, and that in consequence thereof plaintiff's ability to work will be lessened or destroyed, thereby causing a pecuniary loss to pl'ff, then he is entitled to such fair sum as will make good to him this loss and damage.

In estimating this latter element of damages, in case you find that pl'ff is entitled thereto, you will bear in mind that the sum you award pl'ff therefor is awarded him now free from the uncertainties that pertain to human affairs and should not be excessive nor
176 beyond what a sound and discr*ete* judgment on your part w'd approve.

In considering & reaching conclusions upon the various questions submitted to your determination, it is your duty, as I doubt not it will be your pleasure, to exercise your judgment wisely and impartial-y, ignoring all prejudice against corporations and endeavoring to reach such a conclusion as is demanded by the right and as is in accord with the law and evidence submitted to you.

Your verdict should be*en* one or the other of the following forms:

We, the jury, find for the pl'ff and assess his damages at — dollars; or,

We, the jury, find for the defendant.

In either case the verdict must be in writing and be signed by your foreman.

177 To the giving of each of said instructions by the court, on its own motion, numbered four, five, seven, eleven, thirteen, fourteen, fifteen, sixteen, eighteen, twenty, and twenty-two, the defendant then and there duly and separately excepted at the time.

And thereupon the court gave the following instruction to the jury upon the request of the defendant, to wit:

"If you find that the evidence in this case, taken all together, is equally as consistent with the exercise of ordinary care and diligence on the part of the defendant's servants as it is with the alleged negligence on their part, then the plaintiff's case is not made out, and he cannot recover."

The above and foregoing were all and the only instructions given by the court to the jury. Whereupon the jury retired to consider their verdict, and afterwards, and on the same day, returned into court a verdict in favor of the the plaintiff and against the defendant for the sum of fifteen thousand dollars.

And thereupon, afterwards, and upon the 26th day of April, 1883, the court entered judgment upon said verdict in favor of the plaintiff against the defendant for the sum of fifteen thousand dollars and costs, taxed at — dollars; to the rendition of which judgment

178 the defendant then and there duly excepted at the time.

To the end, therefore, that all and singular the matters in this bill of exceptions may be made a matter of record, the defendant now here prays the court to sign this its bill of exceptions, which is accordingly done at the time.

O. P. SHERAS,
U. S. Dist. Judge.

Endorsed as follows, to wit: Filed April 26, 1883. A. J. Van Duryee, clerk.

179 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Van Duryee, clerk of the district and circuit courts of the United States for the northern district of Iowa, eastern division, do hereby certify that the foregoing is a true and perfect transcript of the record in the case of—

JOHN M. O'NEIL
vs.
THE CHICAGO & NORTHWESTERN RAILROAD COMPANY. } No. 32. Law.

As fully as the same appears from the original records and papers now remaining on file in my office and under my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court this 6th day of September A. D. 1883.

[Seal Circuit Court U. S. Northern District of Iowa.]

A. J. VAN DUYEE, *Clerk*.
By ALFRED HOBBS, *Deputy*.

Endorsed on cover: N. Iowa U. S. C. C. No. 307. The Chicago and Northwestern Railway Company, plaintiff in error, vs. John M. O'Neil. Filed 28th September, 1883.

119/566

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 64.

THE CHICAGO & NORTHWESTERN RAILWAY CO., *Plaintiff in Error,*
vs.
E. J. MCLAUGHLIN, EXECUTOR OF JOHN M. O'NEIL, DECEASED, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

CHARLES A. CLARK AND N. M. HUBBARD, *for Plaintiff in Error.*

W. A. FOSTER, *for Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

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Plaintiff in Error,
vs.
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Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

CHARLES A. CLARK AND N. M. HUBBARD, *for Plaintiff in Error.*
W. A. FOSTER, *for Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Clinton, Iowa, is a divsion station on the railway of the plaintiff in error. All freight trains arriving from the east and west are here stopped and re-trained. The tracks of the main line and side tracks in the yard run east and west.

Near the west end of the yard, and about nine feet north of the main line, is a track some fifteen hundred feet long, known as "Number two track," used exclusively for way-cars. Just north of this way-car track is another side-track, known as "track number three." There is a cut-off track from the main line, by which tracks numbers two and three are reached through switches.

Whenever a freight train comes into Clinton from the east or west, the way-car is taken off by a switch engine, and put on this track number two, and when any freight train is to go out either east or west, a switch engine goes on to track number two to get a way-car for such out-going train. All way-cars going or coming from the west are used "first in first out," while those going and coming from the east had "regular run" way-cars. A switch engine went on to number two track about twenty times during each day time, to put away or to get a way-car. Two switch engines were used in the yard in the day time, and three during the night time.

O'Neil was a coach-builder, or car carpenter, and worked for the railway company in its shops at Clinton from 1865 to 1877, except about four years. During this time he was away working mostly for the officers of the company. The shop where he worked was situated about eight rods from the main line, at the east end of the yard, where the volume and character of the traffic could be seen by him.

For about one year before O'Neil's injury he had been accustomed to go upon the way-car track, number two, on an average of once a week to do slight repairs, such as putting in lights of glass broken out of way-car windows, fixing door locks, putting on and repairing lamp-brackets, and the like.

About 10 o'clock in the morning of a clear, pleasant day in October, 1877, O'Neil, by direction of the foreman, went to track number two, to do some repairs on way-cars, and among other things, to take off some old lamp-brackets and put on new ones. After doing some work, O'Neil put his ladder up on the south side of a way-car on number two track. There were seven or eight way-cars on this track—two east of the one on which he was working, and the rest west of it. There was a space of a few feet between those to the west and the other three.

These way-cars were 10 to 12 feet high, and the ladder about the same length. Way-cars project out over the track about two feet, and allowing for the proper slant, the foot of O'Neil's ladder rested near the ends of the ties on the north side of the main line.

The distance from the ladder where O'Neil was, to the switch on

the cut-off east, was about one hundred and seventy-five feet, and to the switch where the cut-off joins the main line, about two hundred and fifty feet. There were two cars just east of the one on which O'Neil's ladder rested, and all three were close together; but whether coupled or not it is unknown. These switches from the main line to the cut-off and to number two track were somewhat worn, and made considerable noise when an engine passed over them.

O'Neil went up the ladder with a brace screw-driver, a hammer, and a new lamp-bracket. He put the new lamp-bracket on top of the car, and stepped down a step or two to take off the old bracket. This was done by taking out two screws with his brace screw-driver, and breaking off two screws with a hammer. Just as this work was finished, which occupied about two minutes according to the best judgment of O'Neil, the car on which his ladder rested received a shock which threw him violently from his ladder, and he struck on the tie, or the iron rail of the main line, breaking the femur in two places, and inflicting very severe and permanent injuries which totally disabled him, and undoubtedly shortened his life.

The accident happened in this way: Switch-engineer Schumaker, Fireman Riggs and Switchmen Wilde and Ellenwood came off a side-track south of the main line, with the engine headed west, and with a way-car ahead of the engine. Just what side-track they came from none of them remember, but it was some side-track which came on to the main line east of the switch which leads from the main line to the cut-off, and to number two way-car track. The object of the switchmen was to go in on way-car track number two, to get a way-car for the use of some out-going train. The situation was such that the engineer, when on the main line east of the cut off switch could have seen O'Neil on the ladder if he had looked; but he was watching his switches ahead of him, and did not see O'Neil at all. After his engine passed off the main line on to the cut-off, and thence on to track number two, the engineer could not have seen O'Neil if he had looked, because he was on the north side of his engine, and the way-car attached to the front of his engine wholly obstructed his view. Switchman Wilde did not see O'Neil until just about the time he fell. Ellenwood was on the north side of the number two track, and could not and did not see O'Neil on the ladder at all.

The fireman, Riggs, saw O'Neil on the ladder when the engine was about 150 feet or more from the most easterly standing cars on the way-car track where O'Neil was working. He watched O'Neil all the time from the first time he saw him until the cars struck, and the accident happened. Riggs was ringing the bell of the engine dur-

ing all this time, and supposed O'Neil would see and hear the engine coming, and get down, as it was his plain duty to do. Riggs thought he made a motion once to go down the ladder, but when the way-car attached to the engine was about a car-length from the east end of the three cars, the west one of which O'Neil was on, Riggs seeing O'Neil had not come down from his ladder, put his head into the cab window, and said to the engineer "Whoa," rather quick and sharp, which was the word Riggs always used when he wanted the engine to stop quickly. Schumaker at once obeyed Riggs' signal word by putting his lever in the back motion. He had already shut off steam from his engine. At this time they were moving four or five miles per hour, and the reversal of the lever would have stopped the engine and car before the car struck the standing cars, on one of which O'Neil was. But when the cars were six to to ten feet apart, and had practically come to a full stop, Switchman Ellenwood, who was on the north side of the way-car track, ready to couple the way-car attached to the engine, to the standing way-cars, seeing the cars were not going to come together so he could make the coupling, gave a signal and called out to Schumaker to come ahead a little. Thereupon Schumaker at once put the lever in the forward motion, and instantly put it in the back motion again, because an instant of forward steam he knew was enough to send the cars together, which proved correct. The coupling was made, and the accident to O'Neil happened.

The instant Riggs heard Ellenwood give the signal to come ahead a little, he told Schumaker that there was a man on the side of the car, but the same instant Schumaker had put his lever forward and back again; the cars had struck and the injury was complete.

When the engine and car came off the main line, they were moving four to five miles per hour. They slacked up for the switch at track number two, and started up again to four or five miles per hour at the time Riggs gave the signal "Whoa." The engine and car were in plain sight of O'Neil from the time they came off the side track on the main line, until they struck the standing cars on one of which he was at work; and he admits that if he had been listening he could have heard the click of the engine coming over the switches, and could have seen the engine while on his ladder by turning his head to the east, and could also have heard the ringing of the bell, but he did not look nor listen while on the ladder at work.

The time which elapsed from the time the engine and way-car left the main line until the accident happened, was probably 12 to 15

seconds, and from the time Riggs gave the signal "Whoa," to the time of the accident, was probably from three to five seconds.

This is believed to be a fair statement of all the material facts, and which are shown by the undisputed testimony. There is no conflict of testimony in the case; but there is some difference of opinion between O'Neil and the engineer and fireman and switchmen as to the severity of the shock to the car on which O'Neil was at work. This, however, is not material, since the railway company concedes that the shock caused O'Neil to fall and by the fall he was severely injured.

There is also a difference of opinion and judgment, as there always is among witnesses, as to distance: thus Ellenwood thinks that the moving car attached to the engine was nearly a car-length (30 feet) away from the standing car when he gave the signal to Schumaker to come ahead a little, so he could make the coupling; while Schumaker and Riggs think that the moving car was not more than four to ten feet away when Ellenwood gave the signal. As Riggs and Schumaker had the best means of knowledge, and knew best what was done on the engine between the time of the signal and the accident, their judgment is the best.

O'Neil begun this suit in the Clinton County Circuit Court for the State of Iowa, March 5th, 1878. It was finally tried in the United States Circuit Court at Dubuque, Iowa, April 20th, 1883, and a verdict and judgment rendered against the railway company and in favor of O'Neil for fifteen thousand dollars. The railway company brings the case here on error.

II.

Three questions are involved.

1. Can any negligence be imputed to the defendant or its servants, by reason of which the plaintiff was injured?

2. Is not the plaintiff guilty of negligence which directly contributed to his injury, and which defeats his right of recovery?

3. Is not the law of Iowa, which makes railway companies liable for the negligence of one employe, by reason of which another employe in the same grade of employment is injured, repugnant to and violative of the last clause of the first section of the fourteenth amendment to the constitution of the United States?

These questions all arise on instructions asked by the defendant and refused by the court, and on instructions given by the court on its

own motion, duly excepted to by defendant at the time, and which are now to be stated.

III.

ERRORS ASSIGNED.

1. The court erred in refusing each of the following instructions asked by the defendant below, on the conclusion of all the testimony:

(a) "Conceding to all the testimony its greatest probative force, it is not sufficient to warrant the jury in finding the defendant or any of its servants guilty of any negligence whereby the plaintiff received his injuries."

(b) "The undisputed and uncontradicted evidence shows that the plaintiff was guilty of negligence which directly contributed to his injury. You are therefore instructed to find for the defendant."

2. The court erred in giving to the jury on its own motion, instruction paragraph 4 (Record p. 78,) as follows:

"4. Under the statute of the State of Iowa, every corporation operating a railway is liable for all injuries caused to, and the consequent damages sustained by, the employes of such corporation in consequence of the neglect of a co-employe in the performance of his duty to the company; that is to say, the negligence of an employe in the discharge of the duties of his position in the employ of the company is deemed to be the negligence of the corporation, and will render the company liable for any injuries caused thereby to any of its other employes, unless the person injured is himself guilty also of negligence contributing to the accident."

The statute referred to by the court in this instruction is as follows:

"Sec. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

3. The court erred in giving to the jury instruction paragraph fourteen (R. 81) as follows:

"14. It is claimed on part of the plaintiff that the switchman on the south side saw O'Neil's danger in time sufficient to have averted the danger.

"On part of defendant it is claimed that this switchman did not see O'Neil in time, and under such circumstances as that, it was his duty to either have stopped the engine or warned the plaintiff of the danger. Has the plaintiff by a fair preponderance of evidence, satisfied you that this switchman had knowledge of plaintiff's danger in time sufficient to have averted the accident either by stopping the engine or through a warning to the engineer, or by notifying plaintiff of the coming danger, so that he could have avoided the accident?

"It is not sufficient for it now to appear that possibly the switchman might have done so if he had known all the facts that are now made apparent. The true inquiry is, was this switchman, acting under the light and knowledge he then had, wanting in the exercise of ordinary care in not stopping the engine, or in not notifying plaintiff of his danger? Did he or not have knowledge of the danger to which plaintiff was exposed in time sufficient to enable him by the use of ordinary care to have caused the engine to be stopped, or to warn the plaintiff, so that he might have gotten down from the ladder before the cars came in contact?"

4. The court erred in giving to the jury instructions paragraphs fifteen and sixteen (R. 81-2) as follows:

"15. It is further claimed on behalf of plaintiff that the fireman, Riggs, was negligent in not notifying the engineer of the peril to which plaintiff was exposed. There is evidence tending to show that Riggs saw the plaintiff upon the ladder and knew of his position, and that there was danger of an injury being caused to him if he did not get down before the cars came in contact; that Riggs gave a signal to the engineer to stop in time to prevent the cars coming into contact, which signal the engineer obeyed by shutting off the steam and reversing the engine.

"On the part of plaintiff it is claimed that Riggs should have notified the engineer of the necessity for stopping the engine, namely, that there was a man in a dangerous position; and it is claimed that Riggs had time sufficient to have so done, so that the engineer could have prevented the cars coming in contact.

"On part of defendant it is claimed that Riggs did all that could

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"On part of defendant it is claimed that this switchman did not see O'Neil in time, and under such circumstances as that, it was his duty to either have stopped the engine or warned the plaintiff of the danger. Has the plaintiff by a fair preponderance of evidence, satisfied you that this switchman had knowledge of plaintiff's danger in time sufficient to have averted the accident either by stopping the engine or through a warning to the engineer, or by notifying plaintiff of the coming danger, so that he could have avoided the accident?

"It is not sufficient for it now to appear that possibly the switchman might have done so if he had known all the facts that are now made apparent. The true inquiry is, was this switchman, acting under the light and knowledge he then had, wanting in the exercise of ordinary care in not stopping the engine, or in not notifying plaintiff of his danger? Did he or not have knowledge of the danger to which plaintiff was exposed in time sufficient to enable him by the use of ordinary care to have caused the engine to be stopped, or to warn the plaintiff, so that he might have gotten down from the ladder before the cars came in contact?"

4. The court erred in giving to the jury instructions paragraphs fifteen and sixteen (R. 81-2) as follows:

"15. It is further claimed on behalf of plaintiff that the fireman, Riggs, was negligent in not notifying the engineer of the peril to which plaintiff was exposed. There is evidence tending to show that Riggs saw the plaintiff upon the ladder and knew of his position, and that there was danger of an injury being caused to him if he did not get down before the cars came in contact; that Riggs gave a signal to the engineer to stop in time to prevent the cars coming into contact, which signal the engineer obeyed by shutting off the steam and reversing the engine.

"On the part of plaintiff it is claimed that Riggs should have notified the engineer of the necessity for stopping the engine, namely, that there was a man in a dangerous position; and it is claimed that Riggs had time sufficient to have so done, so that the engineer could have prevented the cars coming in contact.

"On part of defendant it is claimed that Riggs did all that could

reasonably be expected of him; that he gave the proper signal to stop the engine, and that in obedience thereto the engineer reversed his engine and brought it nearly to a stop, and then, before Riggs had time to ascertain the necessity for any further action on his part, the engineer, in obedience to a signal from the switchman, which could not have been reasonably foreseen by Riggs, gave a forward motion to the engine, and that it was beyond the power of Riggs to again notify the engineer to stop in time to prevent the accident.

"16. It was the duty of Riggs, if he saw the plaintiff was in a dangerous position, and that there was risk of an accident if the cars were brought into contact before plaintiff should get down from the ladder, to take such action as *was reasonably within his power* to stop the engine and prevent the cars from coming into contact.

"When human life or limbs are in peril, ordinary prudence requires that all *reasonable means should be used* by those who are aware of the danger, to avert the same and avoid injury to the person exposed thereto.

"Riggs himself testifies that he saw plaintiff upon the ladder; knew that he was in a dangerous position if the cars were brought into contact, and saw, as the engine approached the standing cars, that the plaintiff remained upon the ladder.

"Under these circumstances, was or was it not his duty to notify the engineer, who had control of the engine, of the nature of the danger to be avoided, or was his duty discharged when he gave the signal to stop by crying out 'Whoa?'

"Did he or did he not have sufficient time to give such informataion to the engineer, if you find the same should have been given?

"It is for you to determine what ordinary prudence, when human life and limb were in danger, required of Riggs under the facts and circumstances known to him at that time, and whether Riggs did or did not do all that ordinary prudence required of him, and all that he had a *fair opportunity to do*, in the exercise of ordinary care, and in the brief time in which he was required to think and act?"

5. The court erred in giving to the jury instructions paragraphs seventeen and eighteen (R. 82-3) as follows:

"17. It is further claimed on part of plaintiff that the engineer did not exercise ordinary care and prudence on his part, in that, after receiving the signal to stop from the fireman, and after, in obedience thereto, reversing his engine and bringing the same nearly to a stop, he then, in obedience to a signal from the switchman on the north

side of the track gave a forward motion to the engine and brought the cars into contact, without first ascertaining the reason why the signal to stop was given by the fireman.

"On part of defendant, it is claimed that the switchman and fireman have a right to signal the engineer, and that it is the duty of the latter to obey such signals, and if the switchman gave the signal without fault on his part, there would not be negligence on part of engineer in obeying the signal thus given.

"18. That the engineer is bound to obey signals given by the switchmen is doubtless true, as a general proposition, but by this can only be meant that the engineer is bound to obey if there is no good reason why he should not obey.

"Suppose he received a signal from a switchman to move forward when he sees that if he does he will cause an accident, would it not then be clearly his duty to disobey the signal? Suppose at the instant he receives a signal from the switchman to move forward his fireman notifies him that there is a man on the track in danger, and that he must stop. It cannot be doubted that in such cases the engineer must disobey the signal from the switchman.

"Take it in this case. Suppose the engineer knew that the plaintiff was on the ladder, exposed to danger, if the cars were brought into contact, and the switchman gave the signal to move forward, would it be acting with reasonable prudence to obey the signal, or would it not be clearly the duty of the engineer to disobey the same?

"But it is in evidence that the engineer in this case did not know in fact that the plaintiff was in danger. He had received a signal from his fireman, on the left of his engine, requiring him to stop, and he obeyed it by shutting off steam and reversing his engine.

"What inference did the engineer draw from the signal given him by the fireman to stop? Did he or did he not infer therefrom that there was some sufficient reason known to the fireman why the engine should not be stopped? Was he not bound to so infer, and if he did, what was it his duty to do when he received the signal from the switchman on the other side of the track to move forward? Did or did not ordinary care and prudence require of him to *ascertain from his fireman the reason of the order to stop given by the fireman on his left*, before he obeyed the order to move forward given him by the switchman on his right?

"The engineer himself testifies that the signal 'whoa' given by the fireman was given somewhat sharply, indicating the necessity for promptly stopping the engine; and he further testifies that from the

distance from the engine to the stationery cars he supposed the order to stop was given by the fireman, not because the cars were close enough for coupling, but for some other cause or reason unknown to him, and that he started the engine forward upon receiving the signal from the switchman without making any inquiry of the fireman whether he could safely do so, or *without inquiring why the fireman had ordered him to stop the engine.*

"In so doing, did or did not the engineer exercise the care which ordinary prudence demanded of him?"

6. The court erred in giving to the jury instruction paragraph nineteen (R. 83–4) as follows:

"19. If, under the instructions given you, you find that none of the employees of the company were guilty of negligence causing the accident, then your verdict must be for defendant, and you need not consider any other of the questions submitted to you.

"If, however, you find that the defendant was negligent in any of the particulars alleged against it, and that such negligence was the immediate cause of the injury to plaintiff, you will then consider whether the defense of contributory negligence set up by the defendant has been made out and sustained by a fair preponderance of the evidence, the burden of the issue in this respect being upon the defendant; or, in other words, in order to defeat plaintiff's recovery on the ground of contributory negligence on his part, you must be *fully satisfied from the evidence*, that plaintiff was guilty of negligence which proximately contributed to the injury complained of.

7. The court erred in giving to the jury instructions paragraphs twenty and twenty-one (R. 84), as follows:

"20. It was the duty of the plaintiff, when he was engaged in the work at which he was put by the defendant, to exercise ordinary care on his part to protect himself from danger.

"He knew when he undertook the repairs on the car in question that it stood upon a track where engines might *possibly* come, and he was bound to the exercise of all the care and watchfulness which an ordinarily prudent man would use under the same circumstances.

"21. Extraordinary care was not required of him. He was expected to do the work that he was sent to attend to, and he could only be required to exercise the care and watchfulness that were *compatible* with the discharge of his duty to the company.

"Plaintiff testifies that he did not see or hear the engine when it was approaching, and it is claimed that his failure to notice its ap-

proach is proof of his negligence, on the theory that if he had kept his senses on the alert he would either have seen or heard the engine in time to have avoided the accident.

"On the part of plaintiff it is claimed that his failure to notice the approach of the engine was due to the fact that the work he was engaged in doing so occupied his attention that without fault upon his part, he failed to notice the coming of the engine, either by sight or sound.

"You will consider all the evidence introduced in the case tending to show what work the plaintiff was required to do—the position he occupied upon the side of the car, the direction in which his face was turned whilst at work upon the ladder, the character of the work upon which he was actually engaged, and the demands, if any, which this work made upon his attention, the distance from where the plaintiff was at work, to the point where the engine came upon track No. 2, the number of cars, if any, between that upon which plaintiff was at work, and the approaching engine, and all facts shown by the evidence adduced by either party which tend to throw light upon the question—and from this evidence, you will determine whether the defense of contributory negligence, as alleged by the defendant, has been established by a fair preponderance of evidence, the burden of establishing the same being, as already stated, upon the defendant."

8. The court erred in giving instruction paragraph twenty-two (R. 85) as follows:

"22. If the evidence, under the instructions given you, fails to establish the fact that the plaintiff was wanting in the exercise of proper care and watchfulness whilst engaged in repairing the way-car of defendant, then the defense of contributory negligence is not made out, and on this issue, you should then find for plaintiff; but, on the other hand, if you find that the failure of plaintiff to notice the approach of the engine was due to a want of ordinary care and watchfulness on part of plaintiff, you will then consider and determine whether the defendant had knowledge of the dangerous position of plaintiff and of his failure to notice the approach of the engine in time to have avoided the injury to plaintiff by the exercise of reasonable care on its part, the rule of law being that, although the plaintiff may have negligently exposed himself to an injury, yet if the defendant, after discovering the exposed situation and danger negligently incurred by the plaintiff, can, by the exercise of reasonable care on its part, prevent any injury to plaintiff, it is bound so to do, and a failure to exercise such reasonable care, after knowledge of the danger to

which plaintiff may be exposed, will render the defendant liable for a resulting injury, notwithstanding the fact that plaintiff may have been in the first instance, negligent on his part.

"Under such circumstances, plaintiff's negligence is not deemed to be a proximate cause of the injury."

"If then, you find from the evidence that the plaintiff, through his failure to notice the approach of the engine in time to get down from his exposed situation on the side of the way-car, was guilty of negligence contributing to the cause of the injury complained of, then your verdict must be for the defendant, unless you further find that, after discovering the fact that plaintiff was at work upon the way-car in such a manner as to expose him to danger in case the cars were brought into contact, the defendant could, *by the exercise of proper care*, have prevented the accident, and that having knowledge of the danger to which plaintiff was exposed the defendant failed to exercise *proper care*, thereby causing the accident, in which case your verdict should be for the plaintiff."

"That is to say, if you find from the evidence that the switch-man Wilde, and the fireman Riggs, or either of them, saw the plaintiff in his exposed position, and knew the danger to which he would be exposed if the cars were brought into contact whilst the plaintiff was on the ladder, then it was the duty of such switchman or fireman, as already explained to you, to take such *reasonable means as were fairly within his power*, to prevent bringing the cars into contact, after he knew that plaintiff had failed to notice the approach of the engine."

"If by the use of such means on part of those in charge of the engine, the accident could have been prevented, and you find that they have failed to use *such means*, after having knowledge of the plaintiff's exposed position and failure to notice the approach of the engine, and that in consequence of such failure, the accident was caused, then the fact that the plaintiff failed to notice the approach of the engine, would not defeat his right of recovery."

IV.

ARGUMENT.

1. Was the railway company guilty of any negligence?

The evidence is all in the record, and without dispute as to the material facts. The rule is that, when the facts are not in dispute, and

are such that but one inference can be fairly drawn from them by a reasonable, unprejudiced mind, then the question is for the court, as a matter of law, to declare whether such facts constitute negligence. If men of reasonable, unprejudiced minds, may fairly arrive at different conclusions from the facts, then the question whether such facts constitute negligence, is for the jury. This rule is familiar, and needs no authorities to be cited in its support.

The contention of O'Neil's counsel is that Engineer Schumaker was negligent because he did not ascertain the cause of Riggs' signal "whoa" before he obeyed Ellenwood's signal to come ahead a little, and especially, as Riggs said "whoa" quick and sharp.

The answer to this is that Riggs had been fireman for Schumaker for more than a year, and the word "whoa" was the word he always used when he wanted him to stop, and he always indicated by saying it slowly or sharp and quick, whether he wanted him to stop quick or slow, and hence, neither the word nor the method of saying it was any indication to Schumaker that any person was in danger.

Schumaker had been switch engineer in that yard for nearly eight years, and during that time, no injury had ever been received by any person from his switch engine. Nearly or quite one-half of all the signals he received while switching, came from the left side, and generally, through Riggs, by this word "whoa," when the engine was wanted to be stopped. So far as starting and stopping and moving about in the yard was concerned, Schumaker was little more than an automaton. His duty was to run his engine by signals almost entirely from the switchmen and his fireman, and he was in the constant habit of obeying all signals received at once, both to go ahead and to stop. (R. pp. 59 and 60).

Schumaker says he did not know why Riggs gave the signal. He knew it was not because they were near enough to couple the cars, for he could see about that himself. He did not know but a pin or link might be wanted before the coupling could be made. (R. p. 69). He did not know, or infer that any person was in danger: but counsel insist that he ought to have inferred, as a reasonably prudent man, in the exercise of ordinary care, that human life or limb was in danger, and therefore should have disobeyed Ellenwood's signal to come ahead a little for that reason. Schumaker had every reason to suppose that no human being was or could be in danger, because he knew Riggs was ringing the bell all the way from the main line, and when the signal was given by Riggs and by Ellenwood, (R. p. 65, bottom). He knew the day was pleasant, and that any person

(if the thought of a person had come to his mind) at work on the way-cars, would hear the bell, and the click of the engine coming over the switches, and be out of the way. So that to charge Schumaker with negligence in this matter, it must first be required of him, in the exercise of ordinary care, to presume that some person was on or about the way-cars at work, who was not only not in the exercise of ordinary care, but guilty of the grossest inattention and negligence while in a place of danger. Such is the degree of care and attention required of Schumaker in this case before he can be convicted of negligence whereby O'Neil was injured; and such was the degree of care required of him by the instructions of the court.

V.

Counsel for plaintiff insists that Wilde, one of the switchmen, was negligent in not notifying O'Neil of his danger.

Wilde was plaintiff's witness, and his testimony shows that his sympathies were with O'Neil. It is necessary to group Wilde's testimony on the subject of when he first saw O'Neil on the ladder. It is as follows:

10 Q. How long had it been before the accident, that you saw the plaintiff?

A. I did not see him till just at the time.

11 Q. What do you mean by that?

A. I did not see him till after cars had struck, he was falling.

12 Q. Was that the first time that day that you saw him?

A. Yes sir; that was, to notice him.

After saying he got off the way-car attached to the engine about a car-length away from the standing cars, on the third one of which O'Neil was on the ladder, he was asked:

43 Q. Did you see the plaintiff when you got off?

A. I saw him about the time it struck; do not remember exactly. (R. 35).

The above was in his first direct examination, July 19th, 1878. The plaintiff recalled him October 11th, 1878, and on direct examination he said, (R. 50):

7 Q. Did you hallo to the fireman before O'Neil fell?

A. Think I did.

8 Q. Whereabouts were you at that time?

A. I was on the ground a few seconds before he was struck. Before that I was on the end of the car where the fireman could not see me.

9 Q. After turning the last switch you jumped on the way-car; which end?

A. The west end.

10 Q. After that did you signal to the fireman to steady up?

A. I did; just before they struck.

11 Q. At the time you signaled, how far was the end of car you were on from the standing car?

A. Do not know exactly; think about one car-length, I should think; am not sure; they were going rather fast then.

12 Q. Was that the first time you saw Mr. O'Neil?

A. *I noticed a man up on the side of the car a little before that; thought he would get down; did not pay much attention to it.*

On cross-examination he says:

"Just before they struck I saw a man on the ladder, and thought he started to get down. That was after I gave the signal to steady." (R. 50, bottom).

On re-direct he says:

3 Q. In your first examination in this case, in answer to the 11th direct interrogatory, you testified, "I did not see him till after the cars had struck; he was falling." Was that answer true?

A. It might have been a second before or after; It was just about the time they struck.

4 Q. Was the plaintiff falling when you first saw him?

A. He was either falling or trying to get down himself. I think he was getting down himself.

Nearly the same question as the one marked "3 Q" above, was here asked, and witness answered:

"I saw him; it might have been a second before or after—just about that time."

The above is all of the testimony of Wilde which relates to the time he first saw O'Neil that day. No witness contradicts Wilde.

On this testimony the plaintiff claimed that Wilde was guilty of negligence in not notifying O'Neil of his danger, and it was submitted to the jury by the court in its fourteenth instruction for that purpose.

It will be observed that Wilde answered four questions in his first examination, which were short and explicit, as to the time when he first saw O'Neil. To all he answered in substance, "Not till about the time the cars struck—about the time he fell."

On his second examination, he answered in substance that he saw "a man up on side of car just before that," which, when traced back to the question, shows that this was before he gave the signal to steady up. But immediately afterwards, he answered on cross-examination, and three times on re-direct, the same as he answered when his testimony was first taken, namely, that he did not see O'Neil till just as the cars struck; just as he fell; thus showing conclusively that Wilde did not catch the meaning of the question when he answered that he saw him before he gave the signal to steady up.

But, if he did say that he saw him before the signal was given, he also says he supposed he would get down, and paid no attention to him. Wilde says the bell was ringing when they crossed the switch to go on the way-car track. (R. 51, 15 Q), and he might fairly presume that O'Neil would hear it and get down; for O'Neil says it was only the work of a half second to get down from his ladder, and thus avoid injury if he had known the engine was coming. (R. 30, near bottom). If Wilde did see O'Neil at a time when the danger was not imminent, he need not take any precautions, because of this presumption that O'Neil would hear and see the engine coming and get down; and for the same reason he need not keep watch to see if O'Neil was going to get down.

There seems a total absence of anything in Wilde's testimony tending to show that he saw O'Neil when in danger until it was manifestly too late to aid him in any way. On the contrary, Wilde testifies that he halloaed to steady up when the engine and car were a car-length away from the standing cars and this was all he could do in any event. Besides, O'Neil should have heard Wilde halloa, for he was not further away from O'Neil than he was from Riggs; but O'Neil heard nothing, and saw nothing. All his senses and faculties were fully employed in taking out two old screws and breaking off two others.

VI.

It is claimed that fireman Riggs was negligent in this: He saw O'Neil in a place of danger when at least 150 feet away, and it was his

plain duty to notify the engineer, not only to stop the engine, but that there was a man in danger.

It is true that Riggs saw O'Neil in ample time to have stopped the engine; but it was O'Neil's duty to be on the lookout for the coming engine and to get down from his ladder, and permit the switch crew to do their work first. Riggs knew this, and was ringing the bell all the way of this 150 feet, and supposed O'Neil must hear it and would get down before the engine approached the standing cars. The engine could be easily stopped in 15 to 20 feet, so it was surely not necessary to stop 150 feet away, for there could be no danger to O'Neil in the engine approaching within a car length of the standing cars. Relying on O'Neil hearing the bell, and his ability to stop in case he did not, Riggs might fairly keep watch, and if, when the engine and car approached the standing cars, O'Neil did not get down, then at the most it was Riggs' duty to give a signal to the engineer in time to surely stop the engine and car before they should strike the standing cars, on one of which O'Neil was working. *This Riggs did do.* When about thirty feet away, Riggs put his head into the cab window, and said "whoa" quick and sharp It was the signal he had always used. It was the signal which Schumaker had always obeyed. Schumaker at once obeyed this signal, and all agree that if Ellenwood had not given the signal to come ahead, the engine and car would have been fully stopped, and would not have struck the standing cars.

The point principally relied upon by plaintiff, is that Riggs should have said more than "whoa"—he should have said "there is a man in danger," or something to that effect, and that this failure constitutes negligence.

Several things should be considered in weighing the conduct of Riggs.

First, it is clear that Riggs gave his signal in time.

Second, the time between giving the signal and the accident was probably not to exceed three to four seconds.

Third, Riggs was undoubtedly somewhat surprised and excited by finding that O'Neil did not come down from the ladder.

Fourth, he had used the signal he always used to stop, and used it quick and sharp.

Fifth, it did not occur to Riggs that his order might be countermanded, for, as soon as it was countermanded, and the mischief was complete, by Schumaker obeying it instantly, and again putting his lever in the back motion, Riggs did say there was a man in danger, but it was then too late.

If Riggs had wholly failed to look out for danger, and had not seen O'Neil at all, or had failed to ring the bell, it would have been a clear case of negligence on the part of Riggs and O'Neil both, and there could have been no recovery, but the plaintiff says that, because Riggs saw O'Neil, and relied on O'Neil's doing his duty, until the cars were so near that Riggs failed to save O'Neil from the consequences of his own gross inattention, that Riggs was negligent.

There is no pretense of wantonness on the part of Riggs. It is only said that he was negligent in not saying there was a man in danger so as to prevent the possibility of a successful countermanding of his order. This would require Riggs to fairly think and conclude, in the exercise of ordinary care, that his signal might be countermanded by Ellenwood, before O'Neil would get down, the work of a second. There is no proof that any such countermanding order had been given previous to that time. There seems absolutely nothing in the evidence to put Riggs on his guard in this respect, or to cause him to think that his signal would be countermanded. It was not necessary, in order to stop the engine, to say there was a man in danger. The word "whoa" used quick and sharp was ample for that purpose. It seems incredible that Riggs can fairly be charged with negligence, after averting the impending danger, because he did not possess the gift of prophecy and foresee and avert a danger which had not arrived.

If Riggs was negligent, he was equally liable with the railway company for O'Neil's injuries. It is scarcely possible that any court or jury would take from the substance of Riggs and give it to O'Neil for this injury, after knowing the conduct of the two men; it is only because this pitiless corporate entity is a defendant, that a recovery is dreamed of.

Riggs' testimony was taken and offered by the plaintiff, and his deposition shows that he was fair and impartial. He agrees with Schumaker, the engineer, in regard to the material facts which produced the accident. Riggs' testimony is found on pages 36 to 46, R., and most of the material parts on the first three pages. Schumaker's testimony begins on page 58 and ends on page 72 of the record. Unless negligence can fairly be imputed to Schumaker, Wilde, or Riggs, the case ends here.

VII.

Was O'Neil guilty of contributory negligence?

O'Neil admits that if he had been listening, he could have heard the click of the engine coming over the switches, and could have heard

the engine bell ring; but says he did not hear either. (R. p. 29). Your honors are already advised of the work he did between the time of going upon the ladder, and the accident, namely, taking out two screws, and breaking off two others, occupying about two minutes, during which time he neither looked in the direction from which the engine came, nor listened for its approach. He knew an engine was liable to come in on that track at any time. His hearing and eye-sight were good. He had worked so long there that he must be presumed to know the rules of the yard. He knew if an engine came to put away a way-car, or to get one out, while he was at work, it would be his duty to get down and let the engine do its work first. He knew he was in a place of danger, and that it was his duty to be watchful for his own safety. It is too manifest for argument that he was not only not watchful, but grossly careless.

Two excuses are put forward for him. First, that he looked before he went up on the ladder, and saw that the switch would have to be turned from the cut-off track that leads to the way-car track, before an engine could come in where he was at work. This only shows that he knew an engine was liable to come in any time, and that it was his duty to keep watch, if an engine came off the main line, to see whether it was going to the way-car track; and this is precisely what he did not do. He says he could not see the switch itself, that turned the cut-off track on to the way-car track, as the switch was on the north side of the cut-off, but that he could see the number two track at the cut-off. If he had heard the engine coming, and looked at it, he would have known at once that it was coming to the way-car track, because it had a way-car ahead of it, and way-cars were never put on the track north of the one he was then on. He had a plain view of the engine and way-car from the time it came on to the main line east of the cut-off switch until it reached the standing cars, on one of which he was at work.

Second. It is said O'Neil's attention was necessarily absorbed by his work, and the inference is drawn that, therefore, he need not be watchful or look out for his own safety. The concentrated mental energy necessary to take out and break off old screws, is a metaphysical problem which was left to the jury in this case, and the result is here. It is enough to say that inattention, when in a place of known danger is one of the very best definitions of negligence.

See Miller v. R. R. Co., 25 Mich., pp. 291–2.

The only question is whether O'Neil's duties were of a character which could fairly be said to be incompatible with looking out for his

own safety. It is true that there are kinds, perhaps, of mechanical labor which require such nice and close attention that a man may fairly become so absorbed as not to notice what is going on around him; but it is submitted that the work in which O'Neil was engaged is not of that character. Both the instructions asked by the railway company on the conclusion of the testimony should have been given.

VIII.

ERRORS IN INSTRUCTIONS GIVEN BY THE COURT.

1. The court erred in giving the fourth instruction. This raised the question whether the statute of Iowa above quoted, is not in conflict with the last clause of the fourteenth amendment to the constitution of the United States. It is not now proposed to argue this question. It is precisely within the decision of the Santa Clara county case, decided by Mr. Justice Field.

See County of Santa Clara v. R. R. 18 Fed. Rep. 385.

It is not within our power to add a new thought or a new consideration to that opinion.

2. The court erred in giving to the jury the fourteenth instruction, because there is no testimony tending to show that the switchman Wilde saw O'Neil at a time when he was in any danger, or in time after he became in danger, to have averted the accident. If it should be conceded that Wilde was negligent in not seeing O'Neil in time, that is fully answered by saying that O'Neil did not see the engine, and do his duty by getting out of the way, and the result would be negligence against negligence, and no recovery.

To convict Wilde of negligence, it must first appear that he saw O'Neil when he was in danger, and failed to take steps to avert it. The utmost that can be said of his testimony is that he saw a man on the side of the car a little before he gave the signal for the fireman to steady up, which was when the cars were about a car-length apart. This signal was "hello," and Wilde was standing on the ground at the west end of the way-car attached to the engine, and about the same distance from O'Neil that he was from Riggs, to whom he gave the signal. O'Neil should have heard this signal. Riggs does not remember Wilde's signal, doubtless because he was watching himself, and gave a signal to the engineer in time to stop the engine on his own motion.

If this instruction has any basis in the testimony, it should have been qualified by saying that Wilde might fairly rely on O'Neil's hear

ing the bell, and taking care of himself until such time as the engine had approached to a point where it could be stopped before striking the standing cars; and the true inquiry then would be, whether Wilde saw him after the engine had reached such point, and then failed to signal the engine. There is no pretense of any such evidence.

For example, if Wilde saw a man on a ladder 150 feet away, and the bell was ringing, he might fairly rely on O'Neil's hearing the bell and getting down, and if, after that, Wilde's own duties took his attention, and he did not again see him until just as the car struck, when it was too late to avoid the injury, then no actionable negligence can be imputed to Wilde, for in that event, it would at most be negligence against negligence, and no recovery.

3. The court erred in giving to the jury the fifteenth and sixteenth instructions. These relate to the alleged negligence of Riggs, the fireman.

The fifteenth instruction, standing alone, is not objectionable, but the sixteenth instruction requires that Riggs should "*take such action as was reasonably within his power to stop the engine.*" Of course it was within Riggs' *power* to have stopped the engine. He could have said "there is a man in danger" the same instant he said "whoa", and then Schumaker would not have obeyed Ellenwood's signal, and the accident would not have happened. So, the court did not put to the jury whether, under the circumstances, Riggs exercised ordinary care, but he told the jury, in good strong substance that if Riggs saw O'Neil in danger in time to have stopped the engine, he must do so, or the defendant is chargeable with actionable negligence.

The court, lest there should be some doubt about it, in this same instruction repeats by saying "when human life or limbs are in peril, ordinary prudence requires that all reasonable *means* should be used by those who are aware of the danger, to avert the same."

It is conceded that Riggs knew O'Neil was in danger—*if he didn't get down*. Riggs, ringing the bell, relied, as he might, on O'Neil hearing it and getting down, until the engine was so near that he could not surely stop it. So the very negligence of O'Neil put Riggs in a state of anxiety and excitement for O'Neils safety; and then the court exacts of Riggs, not the exercise of ordinary care under the circumstances, but the exercise of all the *power* and *means* which existed to avoid the accident. Not a word appears in these instructions, or any other, that Riggs might rely on O'Neil's doing his duty by getting down from his ladder. So far as the jury were informed by the court,

if they found that Riggs could have stopped the engine at any time during the 150 feet that he saw O'Neil, if he failed to do so, the company was liable.

The court, having thus practically settled the question as to Riggs' negligence for the jury, came pretty near submitting it to the jury in the closing clause of the sixteenth instruction, but did not quite do so, for he interjected, at the very close, the old idea, that if Riggs did not do "all that he had a fair opportunity to do in the exercise of ordinary care," the company was liable! What a man should or should not do in the exercise of ordinary care in a given case. is a good fair question to submit to a jury, but to submit to a jury what a man has a "*fair opportunity to do*" in the exercise of ordinary care, is a singular question, but not a legal one. It amounted, after all, to submitting to the jury whether Riggs had time to say there was a man in danger at the same time he said "Whoa," which of course must be conceded.

4. The court erred in giving to the jury the seventeenth and eighteenth instructions, which relate to the alleged negligence of Engineer Schumaker.

The seventeenth one standing alone is unobjectionable. In the eighteenth, after a somewhat elaborate argument to show what defendant did not deny, namely, that if Schumaker had known that a man was in danger, he clearly ought not to have obeyed Ellenwood's signal, the court submitted several interrogatories to the jury in an argumentative way, and finally this one with a nub to it:

"Did or did not ordinary prudence require of him, to ascertain from his fireman, the reason of the order to stop, given by the fireman on his left, before he obeyed the order to move forward, given to him by the switchman on his right?"

Switchman Wilde was on the left, and switchman Ellenwood on the right; both near the end of the way-car attached to the engine which was to be coupled to the first standing way-car. When the signal came from Riggs, Schumaker might fairly suppose that it came through him from Wilde. Schumaker says that he did not know why the stop was called----that it might have been because a link or pin was wanted to couple with. Both switchmen were where they could couple, and so Schumaker might well have thought that Ellenwood was ready to make the coupling, while perhaps Wilde wanted a link or pin for that purpose.

Schumaker had been a switch-engineer in that yard for eight years—had never hurt anybody—never knew or heard of a man stay-

ing on a ladder on the side of a car when an engine was coming ringing its bell. From all his experience and observation he had no reason to apprehend that the cause of Riggs' signal indicated danger to human life or limbs. He was there to obey all signals and without inquiry. If Schumaker had no knowledge of danger, why should he suspect any? The court tells the jury that Riggs said "who" rather sharply, but forgot to say that Schumaker testified that he frequently said it quick and sharp, depending on whether he wanted him to stop quick or slow.

5. The nineteenth instruction relates to the contributory negligence of plaintiff, and says rightly, that the burden is on defendant, and must be sustained by a "fair preponderance of the evidence." Almost immediately after saying this, the court adds: "Or in other words, to defeat plaintiff's recovery on the ground of contributory negligence on his part, you must be *fully satisfied* from the evidence," &c. It is reported that Abraham Lincoln once said to a jury: "Where a question is in doubt, the side on which the jury would soonest bet a sixpence, is the side that has the preponderance of evidence." The difference between a "fair preponderance" and "fully satisfied" does not admit of debate.

6. In the twentieth instruction, the court says:

"He knew when he undertook the repairs on the car in question, that it stood upon a track where engines might *possibly* come."

The undisputed testimony is that switch engines at that time, went on that track to put away or get way-cars twenty times during the day time of every day, and were, therefore, liable to go on to that track at any time.

7. The twenty-first instruction says, in substance, that the only care required of O'Neil was such as was compatible with the work he was sent to do by the company, and submits to the jury whether he exercised such care. The court should have told the jury that, if he knew engines were liable at any time to go upon that track, it was his duty to take sufficient time to do his work so that he could be watchful for his own safety, and especially is this so when it is conceded that it was a place of danger, and that it was O'Neil's duty to get down from his ladder in case an engine came on to that track, and allow the switch force to do their work first.

8. The rule laid down in the first clause of the twenty-second instruction of the court, to the effect that where a plaintiff is negligent, and the defendant becomes aware of it, and the damage which may result therefrom, it is then the defendant's duty to exercise or-

if they found that Riggs could have stopped the engine at any time during the 150 feet that he saw O'Neil, if he failed to do so, the company was liable.

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8. The rule laid down in the first clause of the twenty-second instruction of the court, to the effect that where a plaintiff is negligent, and the defendant becomes aware of it, and the damage which may result therefrom, it is then the defendant's duty to exercise or-

dinary care to prevent accident and injury, is not disputed, with this qualification: In considering what is ordinary care on the part of the defendant in such a case, it ought to appear that the conduct of the defendant shows a wantonness or disregard of life or limb, otherwise there can be no recovery.

To illustrate: If Riggs had permitted the engine to go forward and strike the standing cars without any effort to stop it after seeing O'Neil did not get down from the ladder, then Riggs' conduct would have clearly indicated a disregard for the safety of O'Neil. But Riggs' actual conduct shows he intended to stop the engine, and took the necessary steps to do so which would have accomplished the object only for the unexpected and unlooked for interference of Ellenwood's signal. If Riggs exercised his best judgment in good faith to avoid the accident and injury, and it can still be said that he was negligent, it ought not to be held sufficient to excuse the negligence of O'Neil and make Riggs' negligence alone to be deemed the proximate cause of the injury. For it is clear that the negligence of O'Neil, if any, was proximate, and not remote to his own injury. If it be held that mere negligence on the part of the defendant is sufficient to create a liability where the negligence of the plaintiff, if any, is proximate and not remote, then the doctrine of contributory negligence is practically destroyed.

There are some cases where the doctrine is laid down without the qualification above stated; but in nearly all of them, when the facts are examined, it appears that the conduct of the defendant was either wanton, or exhibited a disregard for the safety of person or property.

In Rathbun & West vs. Penn, et al., 19 Wend. 399., where there had been a collision of canal boats, the court held, Bronson, J., delivering the opinion:

"If a loss be sustained in the night time, and it is attributable *partly* to the want of lights on the boat injured, or to the boat being *out of the proper place*, on meeting another boat, a defendant is answerable only for *gross* negligence, or *wanton* injury."

In R. R. Co., vs. Adams, 26 Ind., 76., it is held that if the negligence of the railroad company is such as to imply disregard of consequences, or a willingness to inflict injury, the plaintiff may recover although a trespasser on the track, or although he did not use ordinary care to avoid injury."

To the same effect see:

R. R. Co. vs. Hutchinson, 47 Ill.. 409.

Brownell vs. Flagler, 5 Hill, 283.

It is only in cases where the negligence of the plaintiff is remote, and not proximate to the injury, that the defendant is held liable for mere negligence, and without wantonness or disregard of the safety of person or property.

Dowell and others v. Navigation Co., 85 Eng. Common Law Rep., 5, E. & B., 194, was a case of collision between a sailing vessel and a steamer. The trial court submitted three questions to the jury:

First. "Was there negligence on the part of the plaintiffs with respect to the light, which led to the collision?"

Secondly. "Could the defendants have avoided the collision by ordinary care and skill?"

Thirdly. "Was the damage occasioned by the accident, the result of circumstances for which more blame attaches to the one side than the other?"

To these questions the jury answered:

First. "We find there was fault on the part of the collier (the sailing vessel) in not continuing the light until the danger was past."

Secondly. "It is the opinion of the jury that the steamer was going at too great a rate of speed on so dark a night, in which respect there was want of caution: but that it was impossible to have avoided the accident when the steamer was within two or three of the collier's lengths."

Thirdly. "We are much inclined to think the preponderance of the blame to be with the steamer."

The trial judge directed a verdict for plaintiff, with leave to move, &c.

Lord Campbell, C. J., in delivering the judgment of the court (page 206 near top) says:

"In some cases, there may have been negligence on the part of a plaintiff remotely connected with the accident, and in these cases, the question arises, whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted donkey case: *Davies v. Mann*. There, although without the negligence of the plaintiff, the accident could not have happened, the negligence is not supposed

to have contributed to the accident within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss. But in the present case, the jury appear to have concluded (as they well might have done upon the evidence) that the negligence of the master of the collier in not properly complying with the Admiralty regulation, directly contributed to the accident, although there was negligence on the other side, and 'the preponderance of blame' was 'with the steamer.'"

It is clear that if O'Neil was guilty of any negligence at all, it was in not hearing the bell or engine, and getting down from his ladder, and this was the proximate cause of the injury, even if it should be found that the defendant was guilty of negligence. The learned Judge, however, in this case, was not satisfied to submit to the jury whether the defendant had exercised ordinary care to prevent the injury, after seeing O'Neil's danger, even after having told them that ordinary prudence under such circumstances meant the use of all the *means reasonably within the power* of the defendant; but proceeded to say further, that if "after discovering the fact that plaintiff was at work upon the way-car in such a manner as to expose him to danger, in case the cars were brought into contact, the defendant could, by the exercise of *proper* care, have prevented the accident, and that having knowledge of the danger to which plaintiff was exposed, the defendant failed to exercise *proper* care, thereby causing the accident," the verdict should be for the plaintiff.

This same charge was twice again repeated in the same instruction in varied language.

While the term "proper care" can hardly be said to be a legal term, yet it is very plain to be understood. It means fit care; suitable care; apt care; appropriate care; in fact, such care as is necessary to accomplish the object desired. It was surely error to require such care of defendant instead of reasonable and ordinary care.

It is respectfully submitted that the errors complained of are well taken, and that there should have been a judgment for the defendant.

CHARLES A. CLARK,
N. M. HUBBARD.

119/526

IN THE

Supreme Court of the United States.

No. 64.—October Term, 1886.

The Chicago and Northwestern Railway Company, Plaintiff in Error,

vs.

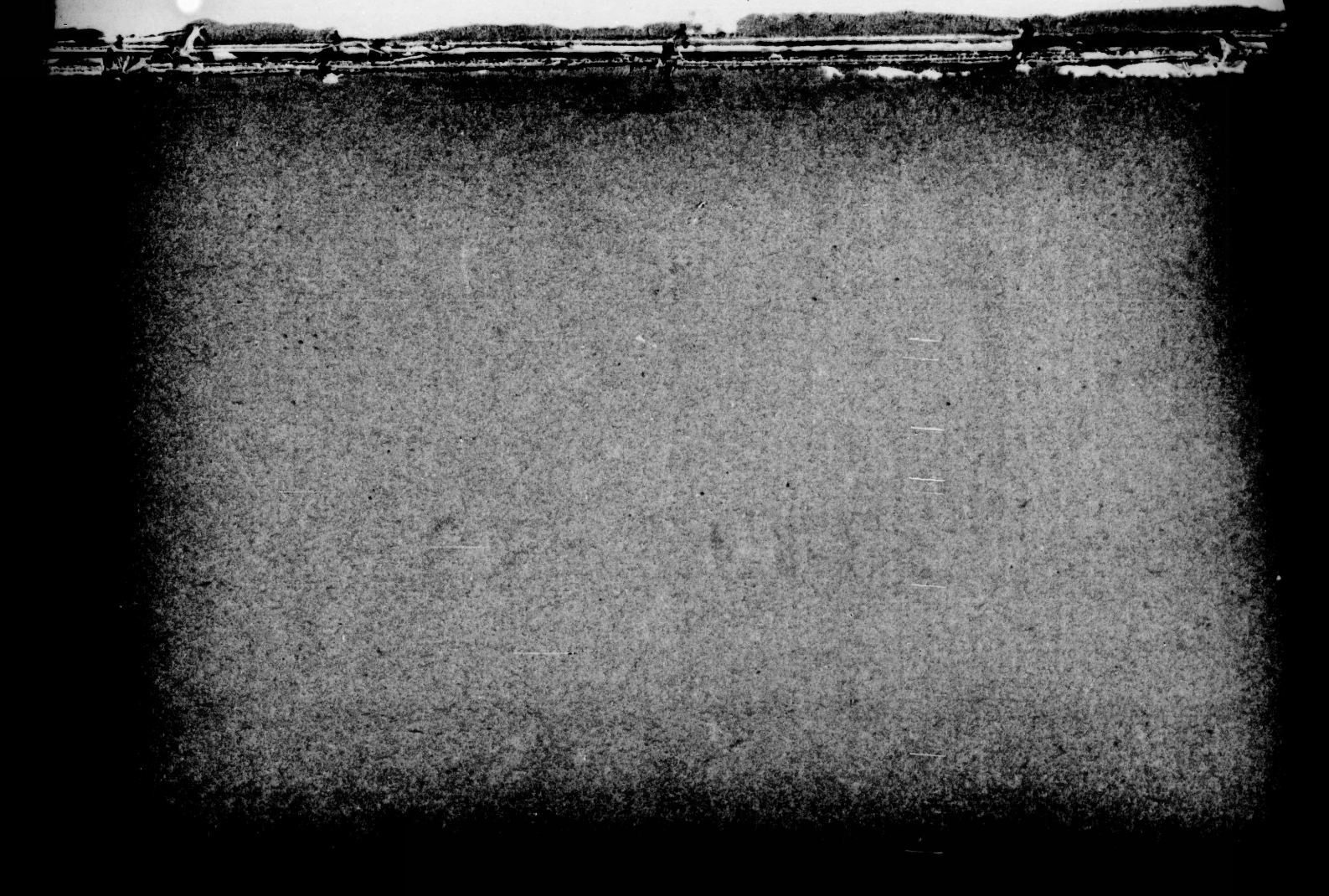
E. J. McLaughlin, Executor of John M. O'Neill, deceased.

In error to the Circuit Court of the United States for the Northern District of Iowa.

REPLY FOR PLAINTIFF IN ERROR.

CHARLES A. CLARK,
N. M. HUBBARD,
For Plaintiff in Error.

Joseph L. Pearson, Printer, 9th and D streets, Washington.



IN THE

Supreme Court of the United States.

No. 64.—October Term, 1886.

The Chicago and Northwestern Railway Company, Plaintiff in Error,

vs.

E. J. McLaughlin, Executor of John M. O'Neill, deceased.

In error to the Circuit Court of the United States for the Northern District of Iowa.

REPLY FOR PLAINTIFF IN ERROR.

CHARLES A. CLARK,
N. M. HUBBARD,
For Plaintiff in Error.

Counsel complain that the statement of facts by plaintiff in error is not, in all respects, either fair, full or true. It will be unfortunate for the plaintiff in error if it has made such a mistake. The statement may not be as full as counsel desire, but it is believed to be a full statement of the material facts, so far as such statement can be made in the compass of four or five printed pages. The entire material testimony is a little less than fifty-five printed pages of questions and answers, and consists of the testimony of O'Neill, Shoomaker, Riggs, Ellenwood, and Wilde; and, as plaintiff in error raises the question that

there is no evidence to prove negligence on its part sufficient to go to the jury, it may become necessary for the court to examine the testimony for itself.

Counsel is mistaken in saying that O'Neill had no warning, for O'Neill proved by two witnessess, Riggs and Wilde, that the bell was ringing at the time of the accident and for some time before. O'Neill himself does not deny that the bell was ringing, but does deny that he heard it. He also says he could have heard the click of the engine going over the switches if he had been listening, and he states also that he did not look in the direction the engine was going at any time while on the ladder at work; nor does he state affirmatively that he listened or gave any heed whatever to the coming of the train.

2. In its first argument, plaintiff in error briefly discussed the alleged negligence against the defendant, and also against O'Neill, and pointed out the objections to the instructions of the court, claiming that there was no negligence proved against the defendant sufficient to submit to a jury, and that the undisputed testimony showed that O'Neill himself was guilty of negligence, which caused his injury.

It is now proposed to reply to the argument of opposite counsel as to the true application of the rule, that where the plaintiff is guilty of negligence and the defendant becomes aware of it, plaintiff's negligence would not defeat a recovery unless the defendant shall use ordinary care to avoid the injury. This general proposition, as an abstract proposition, is not denied, but it is insisted that where the plaintiff's negligence is direct and proximate to the injury, then it must appear that the conduct of the defendant shall exhibit something more than mere negligence, and it must amount either to wantonness or reckless disregard for the person or property of another. Pierce on Railroads (page 325, near the top) sums up the authorities thus: "Some authorities declare the rule of contributory negligence as follows: that the plaintiff's

own negligence, which contributed to the injury, does not defeat his right of action if the defendant might or could, by the exercise of ordinary care, have avoided it. This mode of statement negatives in effect the fundamental doctrine that the injured party cannot recover, if by his failure to use ordinary care, he contributed to the injury. This proposition, however, is less objectionable in substance than in form, if applied only, as it usually is, to two clases of cases; one, where the plaintiff's negligence is so disconnected in time or place from the injury that it cannot be deemed to be the immediate cause of it, or, in law, to have contributed to it; and the other, where the company's servants, after discovering the plaintiff in a dangerous position in which he has negligently or unlawfully placed himself, fail to use the means at their command to save him from harm.

In the former class of cases the plaintiff's negligence is called remote, and is not admitted as a defence to the defendant's proximate negligence; and, in the latter class, the injury is of that wilful or wanton nature that it becomes a cause of action irrespective of the plaintiff's conduct." A large number of cases are cited in support of this text. In the case of Tanner's Executors against Railroad Company, (60 Alabama, 621) the facts were briefly these: Tanner was riding on horseback on the track of the railroad; a coming train was nearly a mile away, and gave the cattle-whistle; he remained on the track knowing that the train was coming, until it was so near that his horse became frightened and unmanageable, and threw him to the ground close to the railroad track, and one of his hands was cut off by the wheels of the cars. The Court held the plaintiff not entitled to recover. In discussing this question of contributory negligence, the Court say (page 637, bottom): "A qualification of the doctrine has been affirmed to the effect that, notwithstanding each party may have contributed proximately to the result, yet, if the defendant wantonly, recklessly, or inten-

tionally brought about the result, mere negligence in the plaintiff contributing proximately to it, will not bar his right of recovery." In the case of Murphy and Wife against Doane and others, (101 Mass. 455,) the facts briefly were that the defendants were about to let down into a cellar a heavy cask on skids; plaintiff came along just as the cask was about to be started from the wagon down the skids which crossed the sidewalk. She started to cross the skids, and just at that instant one of the men holding the cask slipped his foot, and the cask came down against her and she received a severe injury. After discussing the question of contributory negligence, the Court say (page 466): "But where the negligent conduct of the two parties is cotemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover if, by due care on his part, he might have avoided the consequences of the carelessness of the defendant." This case reviews the case of Tuff against Warman, 5 Common Bench (N. S.) 573.

The case at bar, reduced to the important material facts at the time of the injury, are these: O'Neill was on the side of the car, and in a place of danger if the cars came together. If it be conceded, as we think it must, that he was negligent in not seeing and hearing the coming engine and cars, then the question arises whether the defendant saw that negligence, and was then guilty of such negligence as may be fairly said to be wanton or reckless. It is admitted that Riggs, the fireman, saw O'Neill when the cars were 150 feet or more apart, but he says he was ringing the bell and supposed O'Neill would get down, as it was his duty to do. When he came so near that he could not go further without the risk of danger to O'Neill, he gave a signal to the engineer to stop, which was obeyed, and the engine came practically to a full stop some eight or ten feet before the cars came together. So that it must be said that Riggs took ample measures to

stop the train and avoid the danger, but the misfortune was that Ellenwood, the brakeman, who did not see O'Neill, and did not know that he was on the side of the car, gave a signal to go ahead a little, which was immediately obeyed, and it was then too late for Riggs to prevent the accident. The precise negligence, then, with which Riggs is chargeable, if chargeable with any negligence at all, is, not that he did not give the signal, which was obeyed, to stop the engine in time, but he was negligent in not anticipating and inferring that the signal which he did give might be countermanded by some one else. It appears, then, that the immediate cause of the accident was the omission of O'Neill to get down from the car, and the affirmative act of Ellenwood, who had no knowledge of O'Neill's danger, in giving the signal to go ahead. There is no pretence in the case that Ellenwood was guilty of any negligence: none is alleged against him and none is claimed. So that the precise question is, was the failure of Riggs to anticipate that his efforts to stop the engine and cars would be interfered with, any negligence at all, much less such negligence as will admit the inference of wantonness or disregard of the safety of O'Neill. It surely was not negligence in Riggs to proceed with his engine and cars to a point where he could safely stop them before the cars came in collision, if O'Neill did not get down from his ladder. In other words, it was not necessary for Riggs to stop his engine 150 feet away, for the fact is undisputed that the engine could be stopped in fifteen or twenty feet.

In the 16th instruction of the court, it is fairly put to the jury, that if at any time after Riggs saw O'Neill, he had the means and a fair opportunity to stop the engine, it was his duty to do so.

The 22d instruction of the court is obnoxious to the same objection, and to the further one that it did not require of the jury to find that the negligence of Riggs was either wanton or reckless.

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The 22d instruction of the court is obnoxious to the same objection, and to the further one that it did not require of the jury to find that the negligence of Riggs was either wanton or reckless.

One of the best illustrative cases cited by defendant, to the effect that plaintiff's negligence will not enable the defendant to escape liability, if the act which caused the injury was done by defendant after he discovered the plaintiff's negligence, if the defendant could have avoided the injury by the exercise of reasonable care, is the case of Morris vs. C., B. & O. R. R. Co., 45 Iowa, 29. The facts of that case were that the plaintiff was a passenger on one of the defendant's freight trains as a stock shipper. While a freight train was standing in the yard at the station, cut in two, with the engine and one or two cars attached to it, having been cut off to open a street crossing, the plaintiff got upon the top of the freight car on the train next to where the train had been cut in two, for the purpose of looking back to see whether he would have time to get his prod poles before the train came in which was to take his stock and himself. While standing with his back to the engine and two or three cars, across the street, one Platt, a brakeman, gave a signal to the engineer by motion to come back with his engine to couple on to the train. The engine and cars moved back and struck the standing train on which the plaintiff was, by reason of which he fell between the cars and was injured. Platt saw the plaintiff near the edge of the car with his back to the engine and knew he would be in danger if the cars came together, but gave him no notice that the train was about to be coupled. In discussing these facts the court say, (page 32, top): "The evidence shows that at the time of the accident one Platt, who was engaged as an employee of defendant in making up the train, was standing upon the car next to the one upon which plaintiff was standing, and he saw the plaintiff standing in his dangerous position, and while the plaintiff was so standing Platt signalled to the engineer with his hands and arms to back the engine and gave the plaintiff no warning. . . . . As Platt exercised control over the movements of the loco-

motive, it was incumbent upon him to use reasonable care to avoid doing injury by such movement, and if, as a reasonable man, seeing the plaintiff's position on the car so near toward the end, with his back to the locomotive, he could have prevented the accident which resulted from the movement produced by the signal, his negligence will be considered the proximate cause of the injury."

To make the case at bar parallel to this, it should appear that Riggs took no steps whatever to prevent the cars coming in contact where O'Neill was at work. The facts in the Morris case above clearly indicate a disregard for the safety of the plaintiff by Platt, the brakeman, which, we submit, cannot be fairly said of the conduct of Riggs or Wilde.

The quoting of Judge McCrary's opinion in setting aside the verdict for misdirection seems unnecessary in this case. Counsel is mistaken in saying that the plaintiff argued the motion for a new trial before Judge McCrary on the ground that the question should have been submitted to the jury; for we then, as now, ask the Court to instruct the jury to find for the defendant on the ground that there was no negligence on the part of Riggs or any other employee of the defendant.

A point which we desire especially to call to the attention of the Court, and which is perhaps not so specifically put in the opening argument as it should have been, is this: The Court, in the last clause of the 14th instruction, (R. 81,) submitted to the jury whether Wilde had knowledge of the danger to which O'Neill was exposed. The same question was also submitted to the jury in the 22d instruction of the Court (R. 85, near the bottom). It is submitted that there is absolutely no testimony on which this instruction could be based. Wilde was the only witness on that subject, and was called by plaintiff. He testified distinctly, not only that he did not see O'Neill to notice him, but that when he did see the

person on the cars, he did not suppose he was in any danger, and always supposed he saw the engine and cars coming, and that he would get down from the ladder if he wanted to. (See Questions 19, 20, and 21, R. 52, top.)

Respectfully submitted.

CHARLES A. CLARK,
N. M. HUBBARD.

119/566

IN THE

Supreme Court of the United States.

OCTOBER TERM A. D. 1886.

No. 64.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
E. J. McLAUGHLIN, Executor of John M. O'Neill, Deceased,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM A. FOSTER,
FOR DEFENDANT IN ERROR.

CHARLES A. CLARK
AND
N. M. HUBBARD,
FOR PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1886.

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In Error to the Circuit Court of the United States for the Northern District of Iowa.

STATEMENT.

As the court will observe from the transcript of the record in this case, the counsel for the plaintiff in error, instead of presenting briefly what the evidence tended to prove, have brought here the entire evidence, containing questions and answers in full, and covering very many printed pages, and then proceed to present what they are pleased to call a "statement" of the facts in the case, without any reference whatever to the evidence establishing such alleged facts, and upon which I presume they desire this court to act in the consideration of the case. I do not concede that counsel's statement of facts, in all respects, is either fair, full or true.

From the record, as presented, I can do no more than to give my version of omitted and material facts in the interest of the defendant in error, and leave the court where counsel have left it,

groping within the record, amid testimony, material and immaterial, to learn, if possible, the bearing of the facts upon the legal questions presented.

O'Neill was required, in the performance of his duty as an employe of the railway company, to perform work on and about its trains. (Rec., 13, 14.) At the time of the injury, he was acting under the direct order and instruction of his boss. (Rec., 14.) He stood upon a ladder, and, at the time of the injury, was facing westwardly, while the engine which caused the injury came from the east. Before he exposed himself, in the performance of his duty, he found, from examination of the switches, that four switches must be turned, east of him, before a car could enter the track upon which he was working (Rec., 16, 17), and the employes so turning such switches could plainly see him on the ladder. (Rec., 17.)

O'Neill could not see the nearest switch, the turning of which threw the car and engine onto the track, causing the injury, because the lever was on the north side and obscured by standing cars. (Rec., 18 and 35.)

Just before the accident, O'Neill was breaking off screws which held the lamp bracket, with a hammer, with his face within four or five inches of the car. (Rec., 18.)

There were from twenty to thirty trains each way per day, and two switch engines in the yard all day, keeping up a clatter and constant ringing of bells.

O'Neill did not receive any warning, or know of the approach of danger. (Rec., 18.)

The switchman, Wilde, saw O'Neill on the ladder at a distance from the point where the striking cars caused the injury; "*thought he would get down; didn't pay much attention to it.*" (Rec., 50.) He was not furnished a lookout. (Rec., 23.) If the bell had been rung, he would have heard it. (Rec., 29.)

The fireman, Riggs, a part of whose duty it is to look out for

danger (Rec., 39), saw O'Neill for a distance of from 120 to 150 feet (Rec., 44) before reaching the point of injury, and watched him, knowing that if he did not get down from the ladder he would be injured, and knowing, or believing, that he was working, and yet at no time spoke to the engineer of the fact.

Just before the collision he shouted "WHOA!" in an unusually sharp tone (Rec., 64 and 68), but that was all he said. Shoemaker, the engineer, immediately reversed the lever when the fireman said "WHOA!" (Rec., 64), "the reversing of the engine was almost instantaneous." (Rec., 67.) He knew it meant to stop (Rec., 68). Riggs didn't say there is a man on a ladder. It is the fireman's duty to look out for danger and avoid it (Rec., 39 and 68). He didn't know why the fireman ordered him to stop, but did know it had no reference to the contemplated coupling, for he was looking out for that himself (Rec., 69). He did not enquire why the fireman had ordered him to stop, but sent the engine ahead on the signal of the switchman and the injury occurred. (Rec., 64.)

ARGUMENT.

It is conceded that the collision caused the injury to O'Neill which has recently resulted in his death, and that at the time of the injury he was an employe of the railway company.

The laws of the State of Iowa (where the injury occurred) provide that corporations operating railways shall be liable for the damage to an employe by the negligent acts of a co-employe, when such acts are connected with the use and operation of any railway, on or about which they shall be employed. (Code 1873, § 1,307.)

The intention of the section is merely to give the employe in such

cases a right of action, and not to change the degree of care necessary, which is as between master and servant, that of ordinary care and diligence only.

The Disputed Points

in the case have always been the following:

1st. Was the switchman, Wilde, guilty of negligence in not giving warning of O'Neill's danger and thus avoiding the collision?

2d. Was Riggs, the fireman on the engine, who saw O'Neill's peril, guilty of negligence in not preventing the injury?

3d. Was Shoemaker, the engineer in charge of the engine, guilty of negligence in sending the engine ahead and causing the damage, after being ordered to stop by his fireman, without first making inquiry as to why he was so ordered to stop?

4th. Was O'Neill guilty of negligence which prevented his recovery.

The foregoing are all of the disputed questions of fact in the case, and all the questions involved in the case except the claim on the part of the *defendant in error*, that even if O'Neill was guilty of negligence, he may still recover, as his peril was known to the employes of the railway company, and they did not exercise ordinary care and prudence to prevent the injury; and the claim of *plaintiff in error* that the statute of Iowa referred to, is in conflict with the 14th amendment to the constitution of the United States.

The four questions of fact above referred to were all submitted to the jury under proper instructions by the Circuit court, and the claim of counsel for plaintiff in error is, that by so doing the court erred; and they contend that all of said questions should have been decided by the court as matter of law in their favor.

It may be admitted that where facts are not in dispute, and where but one inference can be drawn from them, that the question is for the court and not for the jury.

But the converse of this proposition is also true, that where the facts are undisputed, yet if different minds may honestly draw *different conclusions* therefrom, the question is proper to be submitted to a jury.

Upon this question, that eminent jurist and author, the then Chief Justice of the Supreme court of Michigan, THOMAS M. COOLEY in *D. & M. R. R. Co.* v. *Van Steinberg*, 17 Mich., 99, says (page 117, bottom):

"In determining this question we must look at the case as it ap-
"pears from the plaintiff's own testimony, unqualified by any which
"was offered on the part of defendants, and must concede to him
"anything which he could fairly claim upon that evidence. He had
"a right to ask the jury to believe the case as he presented it; and,
"however improbable some portions of his testimony may appear
"to us, we cannot say that the jury might not have given it full
"credence. It is for them and not for the court to compare and
"weigh the evidence. For the purpose of any positive instructions
"which one party may demand upon the evidence, he must concede
"all that his opponent may claim from it."

Further discussing the question of the court, taking upon itself the responsibility of determining questions of negligence, Judge COOLEY says (page 120):

"For when the judge decides that a want of due care is not
"shown, he necessarily fixes in his own mind the standard of ordi-
"nary prudence, and measuring the plaintiff's conduct by that, turns
"him out of court upon his opinion of what a reasonably prudent
"man ought to have done under the circumstances. He thus makes
"his own opinion of what would be generally regarded as prudence
"a definite rule of law. It is quite possible that if the same ques-
"tion of prudence were submitted to a jury collected from the dif-
"ferent occupations of society, and perhaps better competent to
"judge of the common opinion, he might find them differing with
"him as to the ordinary standard of proper care." * * * *

" But while there is any uncertainty, it remains a matter of fact for " the consideration of the jury."

After citing scores of decisions from many courts, Judge COOLEY continues (page 122, bottom) as follows:

" It is a mistake, therefore, to say, as is sometimes said, that when " the facts are undisputed the question of negligence is necessarily " one of law. This is generally true only of that class of cases " where a party has failed in the performance of a clear legal duty. " When the question arises upon a state of facts on which reasona- " ble men may fairly arrive at different conclusions, the fact of neg- " ligence can not be determined until one or the other of those con- " clusions has been drawn by the jury. The inference to be drawn " from the evidence must be certain and incontrovertible, or they " cannot be decided upon by the court."

The same principle has been declared in

Briggs v. *Taylor*, 28 Vt., 183,
U. P. R. R. v. *Heilman*, 49 Penn., 63,
Isabell v. *R. R. Co.*, 27 Conn., 393,
Parker v. *O'Brien*, 23 Conn., 347,
Ireland v. *R. R. Co.*, 13 N. Y., 533,

and a great many other cases cited by Judge Cooley in the Michigan case above referred to.

In *Railroad Co.* v. *Stout*, 17 Wallace, 657, Justice HUNT, delivering the opinion of this court, said (page 663): " It is true, in many " cases that where the facts are undisputed the effect of them is for " the judgment of the court, and not for the decision of the jury. " This is true in that class of cases where the existence of such " facts come in question rather than where deductions or inferences " are to be made from the facts. If a deed be given in evidence, a " contract proven or its breach testified to, the existence of such " deed, contract or breach, there being nothing in derogation of the " evidence, is no doubt to be ruled as a question of law. * * * " Certain facts we may suppose to be clearly established from which

" one sensible, impartial man would infer that proper care had not " been used, and that negligence existed; another man equally sen- " sible and equally impartial would infer that proper care had been " used, and that there was no negligence. It is this class of cases " and those akin to it that the law submits to the decision of a jury. " Twelve men of the average of the community, comprising men " of education and men of little education, men of learning and " men whose learning consists only in what they have themselves " seen and heard, the merchant, the mechanic, the farmer, the laborer; " these sit together, consult, apply their separate experience of the " affairs of life to the facts proven, and draw a unanimous conclu- " sion. This average judgment thus given it is the great effort of " the law to obtain. It is assumed that twelve men know more of " the common affairs of life than does one man, that they can draw " wiser and safer conclusions *from admitted facts* than can a single " judge."

In the above case Justice HUNT referred with approval to the case of *Patterson* v. *Wallace*, 1 McQueen's House of Lords Cases, 748, where there was no controversy about the facts, but only a question whether certain established facts proved negligence on one side or rashness on the other. The judge withdrew the case from the jury, but it was held in the House of Lords to be a pure question of fact for the jury, and the case was reversed.

The learned judge also cited and approved the reasoning of Chief Justice COOLEY before cited.

It would seem that the rule universally established and adopted by this court, as shown by the decisions above cited and cases in such decisions referred to, that the question of negligence is for the jury and not for the court, even though the facts be undisputed, whenever different minds might honestly draw different conclusions from them.

Applying this rule to the four disputed questions involved in this controversy, and what was it the plain duty of the court to do?

I.

WAS THERE NEGLIGENCE ON THE PART OF WILDE THE SWITCHMAN, AND SHOULD THAT QUESTION HAVE BEEN SUBMITTED TO THE JURY?

While it is true that he several times testified that he saw O'Neill about the time the cars struck, he also stated that he made a motion to "steady up" or to slacken the speed of the engine, when about a car length (or thirty-three feet) away, and that he had seen "a man up on the side of a car a little before that; thought he "would get down; did not pay much attention to it." (Rec., 50.)

Now, what were the circumstances of the parties at that time? Counsel have in their argument estimated the time from entering the last switch until the injury happened, as probably fifteen seconds. During this short time O'Neill was engaged in breaking off some screws with a hammer, his face being turned from the approaching car and within five or six inches of the car upon which he was working. Wilde knew what was going to happen. He knew as a switchman that a collision was to take place with the cars upon which O'Neill was working. He knew the collision was near at hand. He signaled to hold up, or steady up as he expressed it, and yet although he saw the man on the ladder, he thought he would get down, and paid no more attention to it.

Was it not legitimate for O'Neill to contend that he (O'Neill) being unaware of approaching danger, and Wilde having positive knowledge of such danger, it was at least a question to be submitted to the jury as to whether or not Wilde was negligent?

Counsel urge that Wilde did not understand the question and did not intend to say what he in fact said, but it would seem that that argument must be confined to the jury, and cannot successfully be made here.

As Justice Hunt remarked in the case before cited (page 663,

top), "we are not called upon to weigh, to measure, to balance the "evidence, or to ascertain how we should have decided if acting as "jurors."

The only error alleged in the instructions of the court upon this point, is the submitting of the question to the jury, and not to the form of the instruction.

II.

WAS THERE EVIDENCE OF NEGLIGENCE ON THE PART OF RIGGS, THE FIREMAN, AND WAS THAT QUESTION PROPERLY SUBMITTED TO THE JURY?

It will be conceded by counsel that the fireman Riggs saw O'Neill on his ladder on the side of the car while the engine was running a distance of probably 150 feet. That it was his duty to look out for danger and to avoid it, that he knew the engine was going to enter the track where O'Neill was working; knew that he did not appear to be apprised of the approaching danger, and that he (Riggs) was constantly watching him to see if he moved from his place of danger, and seeing that he did not, when within about a car length, or thirty-three feet, he cried "WHOA!" to the engineer, which would have caused the engine to have been stopped, but from the fact that Ellenwood, a switchman on the other side, signaled the engineer to move on. That when Riggs discovered the engine was moving on he said, "there is a man on a ladder," but it was then too late and the injury was done.

Counsel for plaintiff in error will not dispute the above statement of facts, and yet they claim that the court should have held, as matter of law, that Riggs was not negligent.

In *Lombard* v. *Ry. Co.*, 47 Iowa, 494–497, bottom, where an injury resulted from the failure of a brakeman to observe a signal, the court says: "The brake was not applied because "the brakeman did not observe the signal. The person in charge

" of the car did observe it, and undertook to communicate the sig-
" nal to the brakeman, but he did it by motion, merely, and was not
" understood. He should have spoken to the brakeman *and made*
" *him understand.* In failing to do so, he was guilty of carelessness.
" The jury might well have believed that that was the proximate
" cause of the accident, and we should not be justified in setting the
" verdict aside."

So far as the signal of Riggs to the engineer was concerned, it might as well have been by a motion as by the monosyllable whoa! It was his plain duty to so make himself understood as to certainly avoid the injury.

But aside from this we have seen that if different minds might honestly draw different conclusions from the facts, even if undisputed, that it is properly a question for the jury to decide and not for the court.

I will be charitable enough to concede that counsel have drawn an honest conclusion that Riggs did all that care and prudence demanded. How then, do great minds differ!

This cause was once tried by Hon. George W. McCrary, late circuit judge of the eighth circuit, who submitting the question of the acts of Riggs to a jury, used this language:

" 10. The evidence tends to show that the fireman Riggs, who
" was with the approaching engine, could see plaintiff at work on
" the car, and that he did see him for some distance and in ample
" time to have informed the engineer; that he gave no alarm until
" the engine was within about one car length of the standing cars,
" and that he then called out whoa to the engineer, who reversed
" his engine and nearly stopped the train, when the switchman, who
" did not see plaintiff, signaled the engineer to move on, when he
" again put on steam and moved up against the standing car, thus
" causing the injury. If you find these facts the court instructs you
" that it was the duty of the fireman to notify the engineer that

"there was a man on the side of the car and in danger, and to give "such notice in time to enable the engineer to avoid the collision; "and if so notified it would have been the duty of the engineer to "disregard the signal of the switchman to move on. In such a case "he would be bound to presume that the signal had been given in "ignorance of the danger, and he would be bound to act upon his "knowledge of the danger, or any information he had received from "the fireman, or from any other source, that there was a man in "danger."

1 McCrary, Circuit court, Rep., 505.

Judge McCrary did, on a former trial, what counsel urge the trial judge should have done, decided the negligence of Riggs as matter of law, the only difference being that Judge McCrary held as matter of law that he was negligent, while counsel ask this court to hold exactly the reverse. Not only do great minds arrive at different conclusions from the same facts, but the same minds often *change* their conclusions, for no sooner had Judge McCrary charged as matter of law that Riggs was negligent, and the jury had returned a verdict for O'Neill, than counsel made a successful assault upon the ruling, urging that the question should have been submitted to the jury, and so plain did they make this proposition that Judge McCrary reversed himself and granted a new trial upon that one point alone, saying (1st McCrary, C. C. R., 506): "I am in- "clined to the opinion that the 10th instruction given to the jury "was erroneous in that it did not leave it for the jury to say whether "under the circumstances it was the duty of the fireman (Riggs) "to have given to the engineer more definite and explicit warning "concerning the plaintiff's peril. It is doubtful whether the cir- "cumstances of this case bring it within the rule that, the facts being "established, the court may determine the question of negligence "as matter of law. It probably belongs to that other class in which, "although the facts be undisputed, different minds might hon- "estly draw different conclusions therefrom, and if so the ques- "tion is for the jury."

So plain is it from the undisputed evidence that Riggs was negligent, and that the question was properly submitted to the jury, it is regarded as unnecessary at the present time to say more.

III.

SHOULD THE QUESTION OF THE NEGLIGENCE OF SHOEMAKER, THE ENGINEER, HAVE BEEN SUBMITTED TO THE JURY?

As we have already seen, when the engine was within a car length of the point of collision, the fireman, who had been looking out of the cab window on the left side, watching to see whether O'Neill moved from his position, and seeing that he did not, turned to the engineer and said, "Whoa!" possibly shorter or sharper than usual. "If he wanted me to stop quick, he would speak 'Whoa!' SHORT." (Rec., 64, top.) Shoemaker immediately reversed his engine (Rec., 64, middle); the reversal of the engine was almost instantaneous. (Rec., 67, bottom.) He knew it meant to stop. (Rec., 68, middle.) He knew that the fireman's order to stop had no reference to the making of the contemplated coupling, for he was looking out for that himself. (Rec., 69, top and middle.) He did not inquire why the fireman on his left had ordered him to stop, but sent the engine forward immediately upon a signal from the switchman on his right, and the injury complained of was the result.

It would seem from the foregoing facts that if the court should determine the question of the negligence of the engineer as matter of law, it must have held that he was negligent; but this question was also submitted to the jury, and certainly very properly so, for when the distance was altogether too great to make the coupling, and he was exercising his own judgment in regard to that, and was ordered peremptorily to stop from the occurrence of something on the side, where he could not see, he was certainly not justified in obeying the signal to move on from the opposite side from one who

could see no more than he could, of the occasion for coming to an immediate stop.

Counsel desire this court to hold as matter of law that the engineer was not negligent, and in their argument (page 13, middle), say: "Schumaker had been switch engineer in that yard for nearly "eight years, and during that time no injury had ever been received "by any person from his switch engine."

The foregoing is one sample, clipped from their own reasoning, of why the court should agree with their positions in this case, but as the question of the engineer's care or negligence was never an issue, except in the instance of O'Neill's injury, and was wholly inadmissible and incompetent, either to be proved or commented upon in argument, the attempt to reply to such suggestions would be the very height of folly and the most sublime absurdity.

IV.

SHOULD THE QUESTION OF O'NEILL'S NEGLIGENCE HAVE BEEN SUBMITTED TO THE JURY.

The evidence tended to establish that O'Neill was protected from the east by numerous switches that were turned off. That he was not endangered until the last switch was turned, which was at no great distance from him. That the time occupied in running from the last switch was very short. That he was upon the ladder not to exceed two minutes. That his back was to the approaching engine. That there were many engine bells ringing about the yard; that he was in plain view of parties approaching from the east; that he was not warned; that he was using a hammer, and necessarily making some noise, and that he did not hear the engine bell if it was rung.

To show negligence, counsel claim he should have heard the engine bell, which at the time of injury was the length of about four cars away, or something over 100 feet.

By the court's instructions, 20 and 21 (Rec., 84–5), the question of O'Neill's contributory negligence was submitted to the jury, in which the court said (instruction 21): "He knew, "when he undertook the repairs on the car in question, that it stood "upon a track where engines might possibly come, and he was "bound to the exercise of all the care and watchfulness which an "ordinarily prudent man would use under the same circumstances."

The foregoing, with instruction No. 21, correctly present the law.

Counsel insist on arguing the conclusion of facts, rather than the existence of facts to be determined by the jury, and urge that because O'Neill could have heard the engine coming over the switches, if he had listened, and heard the bell, if it had been rung, but did not hear either, that his negligence is established.

In the first place, before going upon the ladder he looked down the track. The switches were turned off, and there was no engine in sight. He got upon the ladder, not for the purpose of standing mute and concentrating his sense of hearing, to the end that he might hear the engine coming over the switches, but to quickly perform the work he was sent to do, and this he proceeded to do, finishing the job by forcibly breaking large screws by the strokes of the hammer, during which he could not hear the engine coming over the switches, because he was *working* instead of quietly standing and listening. O'Neill testified (Rec., 29, top):

"Q. If the bell of the engine that struck the cars had been "ringing as it came up, could you have heard that?

"A. If it was ringing, most certainly I would have heard it, if "it was ringing."

It is true that the employees of the railroad company testified against O'Neill, that the bell was ringing, as it usually does in court, but because the preponderance of witnesses testify in favor of the company, counsel urge the finding of negligence upon the disputed facts as matter of law, which, as we have seen, cannot be done.

There is no proof anywhere in the record, as urged by counsel, that O'Neill was absorbed in his work to the oblivion of his own safety, while solving the "metaphysical problem of breaking off old screws," as stated by counsel.

From the throwing of the last switch, which turned the engine onto the track where O'Neill was working, to the time of the injury, counsel estimate at fifteen seconds. If their estimate is approximately correct, can O'Neill be charged with negligence *as matter of law*, because in that brief space of time, while plying the hammer to the old screws which defied his brace and bit to withdraw, he did not stop and listen, or turn and look?

V.

Counsel for plaintiff in error complain of the rule of law laid down by the Circuit court in the 22d instruction to the jury, to the effect that O'Neill might recover, although he may have negligently exposed himself to injury, provided the defendant after discovering such danger, failed to exercise reasonable care to prevent such injury.

It is undoubtedly true, as a legal proposition, that where both parties are guilty of negligence, which proximately contributes to the injury, neither can recover. But there is a class of cases in which, where one party's negligence has exposed him to danger, and the other party seeing and knowing of such danger fails to exercise ordinary care to prevent it, that there is a liability, and under such circumstances the negligence of the first party is not regarded as the proximate cause of the injury.

In section 36 of Sherman & Redfield on Negligence, the rule is stated as follows: "According to the doctrine of the English decisions "which we have adopted in section 25, the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, "if the defendant, after becoming aware of the plaintiff's danger, "failed to use ordinary care to avoid injuring him. * * * So,

"if a railroad engineer sees persons or property on the track, he "must check his train and do his best to avoid a collision.

"The American cases, in which a contrary opinion is expressed, "will be found, upon analyzing them, to be cases in which the neg- "ligence of the defendant consisted merely in not foreseeing the "negligence of the plaintiff, for which, as we have already shown, "the defendant is not responsible."

The numerous cases cited, both from England and the United States, in notes to sections 25 and 36, by Sherman & Redfield, fully sustain the text as stated by the court in *Railway* v. *Still*, 19 Ill., 499–508: "Neither has the right, because the other has omitted to use "due care, to cease the use of efforts on his part to avoid occasion- "ing injury to the other. That would be to permit the party guilty "of the first negligence to be wantonly killed by the other."

The same rule has been laid down by the Supreme court of Iowa in the following cases:

Morris v. *Ry. Co.*, 45 Iowa, 29.
Lombard v. *Ry. Co.*, 47 Iowa, 494, and
Moore v. *Ry. Co.*, 47 Iowa, 688.

The rule as clearly recognized and adopted in this country as well as in England, was laid down in the court's said twenty-second instruction.

V I.

Counsel have offered some criticisms upon the language used by the court in its instructions, but this court will find from an examination of them, taken as a whole, that they are very clear, full and accurate.

The following language, contained in instruction sixteen, is assailed: "It was the duty of Riggs, if he saw that plaintiff was in "a dangerous position, and that there was risk of an accident if the "cars were brought into contact before plaintiff should get down

"from the ladder, to take such action as was reasonably within his "power to stop the engine and prevent the cars from coming into "contact."

Counsel insist that the court should not have used the words "take such action as was reasonably within his power to stop the "engine," but prefer the words "take *ordinary care*," etc.

The language used by Sherman & Redfield as above quoted is "*do his best.*"

The language of the court was by no means as strong as the above authority would indicate it might have been, but immediately following the language complained of the court proceeds to say:

"Riggs testifies that he saw plaintiff upon the ladder, knew that "he was in a dangerous position if the cars were brought into con- "tact, and saw as the engine approached the standing cars that the "plaintiff remained upon the ladder. Under these circumstances "was or was it not his duty to notify the engineer, who had the "control of the engine, of the nature of the danger to be avoided, "or was his duty discharged when he gave the signal to stop by "crying out whoa? Did he or did he not have sufficient time to "give such information to the engineer, if you find the same should "have been given?

"It is for you to determine what ORDINARY PRUDENCE, when hu- "man life and limb were in danger, required of Riggs under the "facts and circumstances known to him at that time, and whether "Riggs did or did not do all that ORDINARY PRUDENCE required of "him, and all that he had a fair opportunity to do, in the exercise "of ORDINARY CARE, in the brief time in which he was required to "think and act."

From the foregoing it appears not only that the language objected to was properly used, but that in explanation thereof the language contended for by counsel was used in the concluding portion of said instruction no less than three times.

Counsel's objection to the eighteenth instruction resolves itself practically to this: Had the court a right to suppose that Schumaker, the engineer, was a human being, possessing the senses of sight and hearing, and possessed of the power of action, or was he as counsel assume, a thing, a machine, an automaton, a jumping-jack, a something without reason, thought or responsibility?

The argument which they present, to the effect that he lived in a world of signs and signals, and must obey them all without hesitation or inquiry, is too far-fetched and strained to merit candid consideration.

The court in that instruction said: "That the engineer is bound "to obey signals given by the switchman is doubtless true as a "general proposition, but by this can only be meant that the engi- "neer is bound to obey if there is no good reason why he should "not obey," etc. The court then proceeds to submit the disputed facts to the jury in the most clear and concise manner.

The objections to the 19th and 20th instructions disappear at a glance when reference is had to the whole instruction.

The burden of the issue of contributory negligence is upon the railway company, and it must be made out as the court expresses it: "*by a fair preponderance of the evidence.*"

A portion of the 20th instruction is as follows:

"He" (O'Niell) "knew when he undertook the repairs on the "car in question that it stood upon a track where engines might "possibly come, and he was bound to the exercise of all the care "and watchfulness which an ordinarily prudent man would use "under the same circumstances."

The objection by counsel is to the use of the words, "where en- "gines might possibly come," and it is urged that the words "where engines were sure to come," should have been substituted.

This is upon the theory that engines entered the track on which

O'Niell was working at least twenty times per day, and they "were "sure to come."

That would be an average of say one in each half an hour during the day, and yet when O'Niell went upon his ladder to remain for two or three minute's work, and the switches were turned off, and there were no engines in sight or hearing, yet, he must know that "engines might possibly come," and he must exercise the "watch- "fulness which an ordinarily prudent man would use under the same "circumstances."

VII.

The only remaining question suggested by counsel for plaintiff in error, in their printed brief, is whether or not the statute of Iowa, holding every corporation operating a railway liable for injuries sustained by the employes of such corporation, in consequence of the neglect of a co-employe in the performance of his duty to the company, is in conflict with the fourteenth amendment to the constitution of the United States. They declare it to be within the decision of the Santa Clara county case, and decline to argue it "*now*," which leaves it in doubt as to whether they intend to treat this point as a masked battery or an abandoned fortress.

By section 1,307, chapter 5, of the Code of Iowa, 1873, it is provided that every corporation operating a railway shall be liable to employes, etc.

By section 1,278 of the same chapter, it is provided that "All the "duties and liabilities imposed upon corporations owning or operating "railways by this chapter, shall apply to all lessees or other persons "owning or operating such railways, as fully as if they were "expressly named herein, and any action which might be brought, "or penalty enforced, against any such corporation by virtue of any "provision of this chapter, may be brought or enforced against such "lessees or other persons."

It will appear from the last section quoted from the statutes of Iowa, that the statutory liability referred to is not specially applicable to *corporations* operating railways, but is general, and applies to individuals as well, in fact applies alike to all engaged in the hazardous business of operating railways.

The constitution of the State of Iowa provides, section 30 of article 3, "All laws shall be general and of uniform operation throughout "the state."

The statute herein referred to has been held by the Supreme court of Iowa to operate uniformly upon all persons under the circumstances therein contemplated and to be constitutional, and it has uniformly been upheld.

McAunich v. *M. & M. Ry Co.*, 20 Iowa, 338.
Deppe v. *C., R. I. & P. Ry Co.*, 36 Iowa, 52, and many other cases.

In *McAunich* v. *Ry. Co.*, above cited, page 343, the court says: "These laws are general and uniform, not because they operate "upon every person in the state, for they do not, but because every "person who is brought within the relations and circumstances pro- "vided for, is affected by the law. They are general and uniform "in their operation upon all persons in the like situation, and the "fact of their being general and uniform is not affected by the num- "ber of persons within the scope of their operations."

There is practically no difference between the constitution of Iowa referred to, which provides that "all laws shall be general and of "uniform operation," and the clause of the fourteenth amendment to the federal constitution, referred to by counsel, which provides that no state shall "deny to any person, within its jurisdiction, the equal "protection of the laws."

Counsel urge that the Santa Clara county case, 18 Fed. Reporter, 383, is an authority here.

That case can not be more briefly or forcibly illustrated than by

referring to a suggestion made by Justice FIELD in his opinion, holding the statute of California to be in conflict with the fourteenth amendment above referred to. If a citizen owns a tract of land worth $20,000, and it is incumbered for $10,000 under the laws of California, the incumbrance is deducted in listing the property for taxation, and a tax is levied upon a valuation of $10,000.

If a railway corporation owns the adjoining tract of equal value, incumbered to the same extent, the corporation is powerless to obtain a deduction of such indebtedness, and is taxed for the full value of $20,000.

If each piece of property was incumbered to the amount of its full value, the citizen would pay no tax, but the railway corporation must pay upon the valuation of $20,000.

I submit it requires no stretch of the imagination to see a wide distinction between the Santa Clara county case and the one now under consideration.

The statute of California, instead of being uniform in the exercise of its taxing power, made a bold strike and discrimination against railway companies.

Counsel have failed to cite any decision sustaining their views as to the constitutional question suggested by them, probably for the very good reason that there are none.

As before stated, the Iowa courts have sustained the statute referred to, and recently decided that said statute was not only in harmony with the constitution of Iowa, but was not in conflict with the fourteenth amendment to the constitution of the United States.

In the case of *Bucklew* v. *Ry. Co.*, 64 Iowa, 603-610, the Supreme court of Iowa used the following language:

" The court, in substance, instructed the jury that the plaintiff, " under section 1307 of the code, was entitled to recover if he was " injured in consequence of the negligence of a co-employe. It is